

(16,777.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1898.

No. 226.

THE AMERICAN REFRIGERATOR TRANSIT COMPANY,
PLAINTIFF IN ERROR,

vs.

FRANK HALL, TREASURER OF ARAPAHOE COUNTY,
COLORADO.

IN ERROR TO THE SUPREME COURT OF THE STATE OF COLORADO.

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1 STATE OF COLORADO:

In the Supreme Court.

Pleas before the honorable the supreme court of the State of Colorado on the sixth day of December, A. D. 1897, the same being one of the juridical days of the September, A. D. 1897, term of said supreme court.

Present: Honorable Charles D. Hayt, chief justice; Honorable Luther M. Goddard, Honorable John Campbell, judges; Byron L. Carr, attorney general; Felix A. Richardson, bailiff, and James A. Miller, clerk.

2 Be it remembered that heretofore and on, to wit, the 14th day of November, A. D. 1896, came Frank Hall, treasurer of Arapahoe county, Colorado, and filed in this supreme court a duly certified transcript of the record — proceedings, as also attached thereto this original bill of exceptions, upon writ of error to the judgment of the district court of Arapahoe county in a certain cause therein, wherein The American Refrigerator Transit Company, a corporation, was plaintiff and Frank Hall, treasurer of Arapahoe county, Colorado, was defendant, said transcript and bill of exceptions being in words and figures as follows, to wit:

3 STATE OF COLORADO, }
County of Arapahoe, } ss:

District Court, County of Arapahoe, Second Judicial District.

Pleas in the district court of Arapahoe county, State of Colorado, in the first division thereof, before the Hon. C. P. Butler, one of the judges of the second judicial district of the said State, at a term thereof begun and held at the court-house, in Denver, in said county, on the second Tuesday (it being the fourteenth day) of January, A. D. one thousand eight hundred and ninety-six.

Present: Hon. C. P. Butler, one of the judges of the district court; Greeley W. Whitford, Esq., district attorney of said district; E. H. Webb, Esq., sheriff of said county; G. S. Richards, clerk of said court.

4 AMERICAN REFRIGERATOR TRANSIT COMPANY }
vs. } 24063.
FRANK HALL, Treasurer Arapahoe Co., Colo. }

Be it remembered that heretofore and on, to wit, the 26th day of March, A. D. 1896, came the plaintiff, by Percy Werner and C. M. Kendall, its attorneys, and filed herein its complaint.

And said complaint is in words and figures as follows, to wit:

STATE OF COLORADO, }
 County of Arapahoe, } ss:

In the District Court.

THE AMERICAN REFRIGERATOR TRANSIT COMPANY,	}	Complaint.
a Corporation, Plaintiff,		
vs.		
FRANK HALL, Treasurer of Arapahoe County, Colo-		
rado, Defendant.		

The plaintiff complains of the above-named defendant and alleges:

That said Frank Hall is the duly qualified and acting treasurer of Arapahoe county, Colorado.

That the plaintiff is and during all of the times hereinafter mentioned was a corporation, duly organized and existing under and by virtue of the laws of the State of Illinois, with its principal office in the city of East St. Louis, in said State of Illinois, and engaged exclusively in the business of furnishing to shippers refrigerator cars for the transportation of perishable freight over the various lines of railroads throughout the United States; that its said cars are and were during the said times the sole property of the plaintiff and are not and were not during any of the said times allotted, leased, rented, or furnished to carriers of freight, nor were they run upon any particular line or lines of railroad, nor confined to any particular route or routes, nor in any particular trains, nor at any specified times, but are and were furnished to shippers of perishable freight, and are and were used and run indiscriminately over any lines of railroad over which consignors of freight shipped in such cars chose to route them in shipping; that plaintiff derives and during all of said times derived its revenues from said cars from said carriers and transporting the same a mileage of $\frac{3}{4}$ cents per mile; that the cars ran upon their respective lines of railroad, said amount being arrived at by the common consent of all railroad companies in the United States as being just and proper for the use of said cars on said trips, said cars being received, transported, used, and paid for the same as the ordinary freight cars of one railroad company are when run over the lines of other railroads.

Plaintiff further alleges that the business in which said cars, including the cars hereinafter mentioned, are and were during the said times engaged is and was exclusively interstate commerce business, being confined to the interexchange of perishable products of the various parts of the United States.

Plaintiff further alleges that the plaintiff has and has had no office or place of business within the State of Colorado, and that all the freight transported in plaintiff's cars in or through the State of Colorado, including the cars hereinafter mentioned, was transported either from a point or points in a State of the United States outside of the State of Colorado to a point within the State of Colorado, or from a point in the State of Colorado to a point without said State, or between points wholly outside of said

State of Colorado, and that said cars are and were in said State of Colorado at no regular intervals nor in any regular number, and when in said State of Colorado are and were only within said State in transit, except to load or unload freight shipped from within out of the State, or going into the State from without, and then only transiently present for the said purposes, and do not abide and have had no situs within the State of Colorado, nor has this plaintiff nor has it heretofore had any other property of any description whatsoever located within the State of Colorado.

Plaintiff further alleges that, acting under the supposed authority of the Session Laws of the State of Colorado for 1891, pages 292 and 293, the State board of equalization, by its secretary, on or about the 1st day of April, 1895, addressed to the various railroad companies operating lines of railroad in this State letters asking the officers of said companies to make to said board a statement showing the names of all the independent car lines or companies and the total number of all refrigerator, fruit, furniture, stock, oil, or any other cars not belonging to said companies, but under lease or control by said car lines or companies, which were on the lines of their roads respectively in the State of Colorado on December 31st, 1894, giving the name of each line or company and the number of cars belonging to each in their possession on said date; that in pursuance to said request the receiver of the Union Pacific, Den-

7 ver & Gulf Company did report to said board that he had on the line of the railroad which he was operating within the State of Colorado forty-two refrigerator cars belonging to plaintiff; which said report, so far as relates to the number of plaintiff's cars within the State of Colorado on December 31st, 1894, plaintiff admits to be correct, but says that said cars were transiently there, in the business and in the manner above stated and set forth; that the said board of equalization did thereupon assess to the plaintiff said forty-two cars at a valuation of two hundred and fifty dollars (\$250) each, or a total of ten thousand five hundred dollars (\$10,500), and distributed said assessment to the different counties through which said line of said railroad so reported as having possession of said cars in said State extended, according to the mileage of said road in said counties respectively; that said distribution was made as follows, to wit: Arapahoe county, \$760.00; Douglas county, \$520.00; Elbert county, \$180.00; El Paso county, \$1,920.00; Pueblo county, \$1,960.00; Huerfano county, \$1,400.00; Las Animas county, \$3,080.00, and transmitted the same to the proper officials of said counties, and that the county assessor of said Arapahoe county has made out a tax-list based on such assessment and distribution, assessing plaintiff with personal property at said valuation of seven hundred and sixty dollars (\$760), and extended levies thereon, giving the total amount of the taxes as hereinafter set forth, and delivered said tax-list to the county treasurer of said Arapahoe county, with his warrant thereto attached, for the collection of same, and said county treasurer has notified plaintiff of the amount of taxes against said plaintiff in said county for the year 1895 made

pursuant to said assessment, and that same is now due and payable; which taxes so assessed against plaintiff are as follows:

Arapahoe county, \$21.43.

8 Wherefore plaintiff states that said property of plaintiff at the times aforesaid had no situs in the State of Colorado, and said assessment of said property by said board of equalization is without authority of law and void, and that said property of the said plaintiff was not subject to taxation in the State of Colorado or in any of the said counties at said times, and that said mode of assessment is unreasonable and unjust and is unauthorized by law, and that said taxes so extended on said assessment, distributed, as aforesaid, and levied against said property are illegal and void. Plaintiff states that said treasurer of Arapahoe county, as aforesaid, has caused plaintiff to be notified that heavy penalties will accrue if said taxes be not paid by plaintiff on or before March 1st, 1896, and plaintiff alleges that he will distrain, seize, advertise, and sell said property of plaintiff, or any property of plaintiff found in said State, to pay said taxes if the same are not paid, with their accrued interest and penalties, by the month of October, 1886, and will do so unless restrained by this honorable court.

Plaintiff further alleges that it has no plain, speedy, or adequate remedy at law.

Wherefore plaintiff prays that said assessment and levy be declared null and void, and that a temporary writ of injunction be issued out of and under the seal of this court, commanding said defendant and his deputies to refrain from seizing or in any way interfering with said property or making any attempt whatever to collect said taxes, and that upon the final hearing said injunction be made perpetual, and for such other and further relief as to the court may seem meet and proper, and for costs.

PERCY WERNER.

CHARLES M. KENDALL.

9 STATE OF COLORADO, }
County of Arapahoe, } ss:

Charles M. Kendall, being first duly sworn, on his oath deposes and says that the plaintiff in the above-entitled action is a corporation and affiant is one of the attorneys thereof; that affiant has read the foregoing complaint and knows the contents thereof, and that the facts therein stated are true to the best knowledge and belief of affiant.

CHARLES M. KENDALL.

Subscribed and sworn to before me this 26th day of March, A. D. 1896.

G. S. RICHARDS, Clerk.

(Endorsed :) 24063-1. In the district court. The American Refrigerator Transit Company, plaintiff, vs. Frank Hall, treasurer of Arapahoe county, defendant. Complaint. Filed in district court, Arapahoe county, Colo., Mar. 26, 1896. G. S. Richards, clerk.

10 And afterwards and on, to wit, the 28th day of March, A. D. 1896, came the defendant, by his attorneys, and filed herein his demurrer.

And said demurrer is in words and figures as follows, to wit:

STATE OF COLORADO, }
County of Arapahoe, } ss.:

In the District Court.

THE AMERICAN REFRIGERATOR — COMPANY, a Corpo-	} Demurrer.
ration, Plaintiff,	
vs.	
FRANK HALL, Treasurer of Arapahoe County, Colo-	}
rado, Defendant.	

The defendant, by Goudy & Twitchell, his attorneys, comes and demurs to plaintiff's complaint herein, and for cause of demurrer says:

That said complaint does not set forth facts sufficient to constitute a cause of action against this defendant or to entitle plaintiff to any relief whatever in the premises.

Wherefore defendant prays to be dismissed with *its* costs.

GOUDY & TWITCHELL,
Attorneys for Defendant.

(Endorsed :) 24063. District court. The American Refrigerator Transit Co. *vs.* Frank Hall, treas., etc. Demurrer. Filed in district court, Arapahoe county, Colo., Mar. 28, 1896. G. S. Richards, clerk. Goudy & Twitchell, att'ys for def't.

11 And afterwards and on, to wit, the 4th day of May, A. D. 1896, the same being one of the regular juridical days of the April term, 1896, of said court, the following proceedings, *inter alia*, were had and entered of record in said court, to wit:

THE AMERICAN REFRIGERATOR TRANSIT COM-	} 24063. Injunction.
pany	
vs.	
FRANK HALL, Co. Treasurer.	

At this day comes the plaintiff, by its attorneys, and, upon its motion, the defendant consenting thereto—

It is ordered by the court that said plaintiff has leave to amend its complaint herein by interlineation.

And afterwards and on, to wit, the 11th day of May, A. D. 1896, the same being one of the regular juridical days of the April term, 1896, of said court, the following proceedings, *inter alia*, were had and entered of record in said court, to wit:

THE AMERICAN REFRIGERATOR TRANSIT Company }
 vs. } 24063. For Injunction.
 FRANK HALL, Co. Treasurer.

At this day comes the plaintiff, by its attorneys, Percy Werner, Esq., and Chas. M. Kendall, Esq., and the defendant, by his attorneys, Messrs. Goudy & Twitchell, also comes; and thereupon 12 this cause comes on to be heard upon the demurrer of the said defendant to the complaint herein, is argued by counsel, and the court, being now sufficiently advised in the premises, doth overrule said demurrer.

And thereupon it is ordered by the court that said defendant have five (5) days in which to elect.

Whereupon it is ordered by the court that upon the giving by said plaintiff of a good and sufficient bond, conditioned in the penal sum of five hundred dollars (\$500.00), and with surety or sureties to be approved by the clerk of this court, a temporary writ of injunction herein may issue, as prayed for in said complaint.

And afterwards and on, to wit, the 16th day of May, A. D. 1896, the same being one of the regular juridical days of the April term, 1896, of said court, the following proceedings, *inter alia*, were had and entered of record in said court, to wit:

THE AMERICAN REFRIGERATOR TRANSIT Co. }
 vs. } 24063. Injunction.
 FRANK HALL, County Treasurer.

At this day comes the defendant, by his attorneys, Messrs. Goudy & Twitchell, and upon his motion—

It is ordered by the court that said defendant have time and until ten (10) days from this day in which to answer the complaint herein.

13 And afterwards and on, to wit, the 26th day of May, A. D. 1896, came the defendant, by his attorneys, and filed herein his answer to plaintiff's complaint.

And said answer is in words and figures as follows, to wit:

STATE OF COLORADO, }
 County of Arapahoe, } ss:

In the District Court of said County.

THE AMERICAN REFRIGERATOR TRANSIT COMPANY, a }
 Corporation, Plaintiff, } Answer.
 vs. }
 FRANK HALL, Treasurer of Arapahoe County, Defendant. }

The defendant, answering plaintiff's complaint herein—

Denies that the plaintiff is engaged exclusively or at all in the business of furnishing to shippers refrigerator cars for the purposes mentioned in said complaint or otherwise.

Denies that its cars are not or were not during any of the times alleged in said complaint allotted, leased, rented, or furnished to carriers of freight.

Denies that such cars are or were furnished to shippers of freight, perishable or otherwise, or are or were used or run indiscriminately over any lines of railroad over which the consignors of freight shipping such cars chose to route them in shipping.

That as to whether the amount, viz., $\frac{3}{4}$ of one cent per mile, paid by the carriers for the use of said cars running upon their respective lines was or is arrived at by common consent with the
14 railroad companies in the United States, as alleged in said complaint, or whether the same is a contract price as between the divers railroad companies and said plaintiff, defendant has not and cannot obtain sufficient knowledge or information upon which to base a belief.

Defendant denies that the business in which said cars, including the cars mentioned in said complaint, are or were engaged and used during the said times is or was exclusively or at all interstate-commerce business, as alleged in said complaint or otherwise.

Denies that said cars have no situs within the State of Colorado, or that said plaintiff has not or had not at the time said cars became assessable, or at the time fixed for assessment of personal property within the State of Colorado, no cars or property of any description within said State.

Defendant further denies that the property of said plaintiff so assessed in this State for the year 1895 by the State board of equalization was assessed in the manner alleged in said complaint, but, on the contrary, alleges that said cars were assessed to the plaintiff as cars owned by it and actually used as a part of the rolling stock of the railroad company making return thereof to the State board of equalization, and necessary for the transportation of freight and the operation of said railroad within this State during the year for which said statement was made, and was so returned as the property of plaintiff and was assessed to the plaintiff, owner thereof, instead of to the railroad company using such rolling stock.

Defendant further says said complaint does not state facts sufficient to constitute a cause of action against this defendant or to entitle plaintiff to any relief in equity.

Further answering said complaint, defendant alleges:

15 That the plaintiff, as a corporation, is and was at all of said times doing business within the State of Colorado and within the county of Arapahoe and the other counties mentioned in said complaint, and that said assessment and levy complained of was so made upon property owned and used by it at and during the time for which assessment for taxation was made, and that said property was so owned and used by it within the territory aforesaid and within the territorial limits of the State board of equalization and of the board of county commissioners of the county of Arapahoe.

That the valuation so placed upon said property of said plaintiff for taxing purposes by said board of equalization is in nowise ex-

cessive but is a fair and just valuation and not in excess of the valuation placed upon other like property similarly situated within the jurisdiction of said State board of equalization; that said assessment was duly and properly made, and said taxes duly and properly levied.

Wherefore defendant says that said property of the plaintiff is subject to taxation within said State of Colorado and said county of Arapahoe and properly assessed and taxed therein, and defendant asks to be dismissed with his costs in this behalf.

GOUDY & TWITCHELL,
Attorneys for Defendant.

STATE OF COLORADO, }
County of Arapahoe, } ss:

Frank Hall, being first duly sworn, on oath deposes and says that he as the county treasurer of said county of Arapahoe is the defendant in the above-entitled action; that he has read the foregoing answer and knows the contents thereof, and that the
16 matters therein stated are true to his best knowledge and belief.

FRANK HALL.

Subscribed and sworn to before me this 26 day of May, A. D. 1896.

G. S. RICHARDS, *Clerk,*
By F. E. BUTLER,
Deputy Clerk.

(Endorsed:) 24063. District court. The American Refrigerator Transit Company vs. Frank Hall, treas. Answer. Filed in district court, Arapahoe county, Colo., May 26, 1896. G. S. Richards, clerk. Goudy & Twitchell, att'ys for def't.

And afterwards and on, to wit, the 8th day of June, A. D. 1896, came the plaintiff, by its attorneys, and filed herein its replication.

And said replication is in words and figures as follows, to wit:

17 STATE OF COLORADO, }
County of Arapahoe, } ss:

In the District Court.

THE AMERICAN REFRIGERATOR TRANSIT COMPANY,	} Replication.
Plaintiff,	
vs.	
FRANK HALL, Treasurer of Arapahoe County, Colo-	}
rado, Defendant.	

Now comes the plaintiff in the above-entitled action and, for replication to the answer of defendant herein, denies all new matters set up in said answer and each and every allegation in said answer contained.

Wherefore plaintiff prays relief as it has heretofore demanded in its complaint.

PERCY WERNER &
C. M. KENDALL

Attorneys for Plaintiff.

STATE OF COLORADO, }
County of Arapahoe, } ss:

Charles M. Kendall, being first duly sworn, on his oath deposes and says that he is one of the attorneys for the plaintiff in the above-entitled action; that said plaintiff is a corporation; that affiant has read the foregoing replication and knows the contents thereof,
18 and that the same is true to the best knowledge and belief of this affiant.

CHARLES M. KENDALL.

Subscribed and sworn to before me this 8th day of June, 1896.

G. S. RICHARDS, *Clerk.*

(Endorsed:) 24063. In the district court. The American Refrigerator Transit Company, plaintiff, *vs.* Frank Hall, treasurer, defendant. Replication. Filed in district court, Arapahoe county, Colo., Jun- 8, 1896. G. S. Richards. Percy Werner & C. M. Kendall, attorneys for plaintiff.

And afterwards and on, to wit, the 26th day of June, A. D. 1896, came the plaintiff, by its attorneys, and filed herein its undertaking on injunction.

And said undertaking is in words and figures as follows, to wit:

STATE OF COLORADO, }
County of Arapahoe, } ss:

In the District Court of the Second Judicial District of the State of Colorado in and for the County of Arapahoe.

19	THE AMERICAN REFRIGERATOR TRANSIT Company, Plaintiff,	} Undertaking on Injunction.
	<i>vs.</i>	
FRANK HALL, Treasurer of Arapahoe County, Defendant.		

Whereas the above-named plaintiff has commenced or is about to commence an action in the district court of the 2nd judicial district of the State of Colorado in and for the said county of Arapahoe against the above-named defendant, and is about to apply for an injunction in said action against said defendant, enjoining and restraining him from the commission of certain acts, as in the complaint filed in the said action is more particularly set forth and described:

Now, therefore, we, the undersigned, residents of the county of Arapahoe, State of Colorado, in consideration of the premises and of the issuing of said injunction, do jointly and severally undertake

in the sum of five hundred dollars and promise to the effect that in case said injunction shall issue the said plaintiff will pay to the defendant all costs and damages as shall be awarded against the complainant in case the said injunction shall be modified or dissolved in whole or in part.

Dated this 22nd day of June, A. D. 1896.

WILLARD TELLER.
CHARLES M. KENDALL.

STATE OF COLORADO, }
County of Arapahoe, } ss :

Willard Teller and Charles M. Kendall, the sureties whose names are subscribed to the above undertaking, being severally duly
20 sworn, each for himself says that he is a resident and freeholder within the said Arapahoe county, and that he is worth the sum specified in the said undertaking as the penalty thereof, over and above his just debts and liabilities, in property not by law exempt from execution in this State.

WILLARD TELLER.
CHARLES M. KENDALL.

Subscribed and sworn to before me this 25th day of June, A. D. 1896.

My commission expires March 2, 1900.

CLARENCE J. MORLEY,
Notary Public.

[SEAL.]

(Endorsed :) No. 24063. District court, 2nd judicial district, Arapahoe county. American Refrigerator & T. Co., plaintiff, *versus* Frank Hall, &c., defendant. Undertaking on injunction. Approved and filed this 26th day of June, A. D. 1896. G. S. Richards, clerk.

And afterwards and on, to wit, the 19th day of September, A. D. 1896, came the parties hereto, by their attorneys respectively, and filed herein their stipulation.

And said stipulation is in words and figures as follows, to wit :

21 STATE OF COLORADO, }
County of Arapahoe, } ss :

In the District Court.

THE AMERICAN REFRIGERATOR TRANSIT COMPANY,	} Stipulation.
Plaintiff,	
vs.	
FRANK HALL, Treasurer, Defendant.	

Upon the issues made by the pleadings in this case it is stipulated as follows, viz :

1st. That plaintiff is and was during the times mentioned in the petition a corporation duly organized and existing by virtue of the laws of the State of Illinois, with its principal office in the city of

East St. Louis, in said State; that it is engaged in the business of furnishing refrigerator cars for the transportation of perishable products over the various lines of railroads in the United States; that these cars are more expensive than the ordinary box or freight car; that the cars herein referred to are the sole and exclusive property of the plaintiff, and that plaintiff furnishes the same to be run indiscriminately over any lines of railroad over which shippers or said railroads may desire to route them in shipping, and furnishes the same for the transportation of perishable freight upon the direct request of shippers or of the railroad companies requesting the same on behalf of shippers, but on the responsibility of the carrier and not of the shippers; that as compensation for the use of its cars plaintiff received a mileage of three-fourths of a cent per mile from

each railroad company over whose lines said cars are run,
22 such rate of payment being the same as is paid by all railroad companies to each other for the use of the ordinary freight cars of each when used on the lines of others in the exchange of cars incident to through transportation of freight over connecting lines of railroads; that plaintiff has not and never has had any contract of any kind whatsoever by which its cars are leased or allotted to or by which it agrees to furnish its cars to any railroad company operating within the State of Colorado; that it has and has had during said times no office or place of business nor other property than its cars within the State of Colorado, and that all the freight transported in plaintiff's cars in or through the State of Colorado, including the cars assessed, was transported in such cars either from a point or points in a State of the United States outside of the State of Colorado to a point in the State of Colorado or from a point in the State of Colorado to a point outside of said State, or between points wholly outside of said State of Colorado, and said cars never were run in said State in fixed numbers nor at regular times, nor as a regular part of particular trains, nor were any certain cars ever in the State of Colorado except as engaged in such business aforesaid, and then only transiently present in said State for such purpose.

That, owing to the varying and irregular demands for such cars, the various railroad companies within the State of Colorado have not deemed it a profitable investment to build or own cars of such character, and therefore relied upon securing such cars when needed from the plaintiff or corporations doing a like business.

That it is necessary for the railroad companies operating within the State of Colorado, and which are required to carry over their lines perishable freight, such as fruits, meats, and the like, to have such character of cars wherein they can safely transport such character of freight.

23 2nd. That the average number of cars of the plaintiff used in the course of the business aforesaid within the State of Colorado during the year for which such assessment was made would equal forty, and that the cash value of plaintiff's cars exceed the sum of two hundred and fifty dollars per car, and that if such property of the plaintiff is assessable and taxable within such State of Colorado, then the amount for which such cars, the property of

the plaintiff, is assessed by said State board of equalization is just and reasonable and not in excess of the value placed upon other like property within said State for the purposes of taxation.

3rd. That said company is not doing business in this State except as shown in this stipulation and by the facts admitted in the pleadings.

4th. That in case it is found by the court, under the undisputed facts set forth in the pleadings and the facts herein stipulated, that the authorities of the State of Colorado under existing laws have no power to assess or tax the said property of plaintiff, then judgment shall be entered herein for the plaintiff for the relief prayed; otherwise judgment shall be entered for the defendant.

PERCY WERNER AND C. M. KENDALL,
Att'ys for Plaintiff.
GOUDY & TWITCHELL, *Att'ys for Defendant.*

(Endorsed:) 24063. In the district court. The American Refrigerator Transit Company vs. Frank Hall, treasurer. Stipulation. Filed in district court, Arapahoe county, Colo., Sep. 19, 1896. G. S. Richards, clerk. Percy Werner and C. M. Kendall, attorneys for plaintiff.

24 And afterwards and on, to wit, the 19th day of September, A. D. 1896, the same being one of the regular juridical days of the September term, 1896, of said court, the following proceedings, *inter alia*, were had and entered of record in said court, to wit:

Before Hon. C. P. Butler.

THE AMERICAN REFRIGERATOR TRANSIT COMPANY	} 24063.
<i>vs.</i>	
FRANK HALL, County Treasurer.	} Injunction.

At this day comes the plaintiff, by its attorney, C. M. Kendall, Esq., and the defendant, by Messrs. Goudy and Twitchell, his attorneys, also comes; and thereupon this cause comes on to be tried before the court without a jury, a jury herein being expressly waived by consent of both parties hereto.

And the court, having heard the evidence produced as well on behalf of the said defendant as of said plaintiff, and the arguments of counsel, and being now sufficiently advised in the premises, doth find the issues herein joined in favor of the said plaintiff; whereupon—

It is ordered by the court that judgment be entered herein in favor of said plaintiff, according to the prayer of said plaintiff's complaint, and let the same be recorded in the judgment book.

And afterwards and on, to wit, the same day, the following further proceedings, *inter alia*, were had and entered of record in the judgment book of said court, to wit:

25 THE AMERICAN REFRIGERATOR TRANSIT
Company
vs.
FRANK HALL, Treasurer of Arapahoe County, Colo-
rado. } 24063.
Injunction.

The court having this day ordered that judgment be entered herein in favor of plaintiff, according to the finding of the court, now, therefore—

It is considered by the court that the temporary injunction heretofore issued herein be, and the same hereby is, made perpetual, and that said plaintiff do have and recover of and from the said defendant its costs in this behalf laid out and expended, to be taxed, and have execution therefor.

And afterwards and on, to wit, the same day, the following further proceedings, *inter alia*, were had and entered of record in said court, to wit:

THE AMERICAN REFRIGERATOR TRANSIT COMPAYN }
vs. } 24063.
FRANK HALL, Treasurer of Arapahoe County, Colo- }
rado. } Injunction.

At this day comes the said defendant, by his attorneys, Messrs. Goudy & Twitchell, and prays an appeal to the supreme court of the State of Colorado, which is allowed upon condition that he file herein within thirty (30) days from this day his appeal bond in the penal sum of three hundred dollars (\$300.00), with sureties to be approved by the clerk of said court, and time and until thirty
26 (30) days from this day is allowed said defendant within which to prepare and tender to the judge of this court his bill of exceptions by him reserved herein, which, when signed and sealed by the said judge, shall be filed herein as of this day.

STATE OF COLORADO, }
County of Arapahoe, } ss:

I, G. S. Richards, clerk of the district court of Arapahoe county, State aforesaid, do hereby certify the above and foregoing to be a true, complete, and perfect transcript and copy of the complaint, demurrer, answer, replication, injunction bond, stipulation, and orders of court had and entered of record in a certain cause in said court lately pending, wherein The American Refrigerator Transit Co. was plaintiff and Frank Hall, treasurer, etc., was defendant, as the same now remains on file and of record in this office.

And I further certify the accompanying bill of exceptions to be the original bill of exceptions filed in said cause.

Witness my hand and the seal of said court, at the court-
[SEAL.] house, in Denver, county and State aforesaid, this 2nd day
of November, A. D. 1896.

G. S. RICHARDS, Clerk.

27 STATE OF COLORADO, } ss:
 County of Arapahoe, }

In the District Court, Division I, September Term, A. D. 1896.

THE AMERICAN REFRIGERATOR TRANSIT COMPANY, a Corporation, Plaintiff,	} No. 24063.
vs.	
FRANK HALL, Treasurer of Arapahoe County, Colorado, Defendant.	

Defendant's Bill of Exceptions.

Be it remembered that on, to wit, the 11th day of May, A. D. 1896, the same being one of the regular juridical days of the April term, A. D. 1896, of said court, the above-entitled cause came on for hearing before the Honorable C. P. Butler, one of the judges of said court, on defendant's demurrer to the plaintiff's complaint, the said plaintiff appearing by Percy Werner, Esq., and C. M. Kendall, Esq., its attorneys, and the said defendant appearing by Messrs. Goudy & Twitchell, his attorneys.

Thereupon the following proceedings were had:

The said demurrer was argued by counsel and submitted to the court, which demurrer was by the court overruled.

To which ruling of the court the said defendant, by his counsel, then and there duly excepted.

28 And afterwards and on, to wit, the 19th day of September, A. D. 1896, the same being one of the regular juridical days of the September term, A. D. 1896, of said court, the above-entitled cause came on for trial before the Honorable C. P. Butler, one of the judges of said court (a jury being expressly waived by both the plaintiff and defendant, by their respective counsel, in open court), the said plaintiff appearing by Percy Werner, Esq., and C. M. Kendall, Esq., its attorneys, and the defendant appearing by Messrs. Goudy & Twitchell, his attorneys.

Thereupon the following proceedings were had, to wit:

The following is the statement of facts:

STATE OF COLORADO, } ss:
 County of Arapahoe, }

In the District Court.

THE AMERICAN REFRIGERATOR TRANSIT COMPANY,	} Stipulation.
Plaintiff,	
vs.	
FRANK HALL, Treasurer, Defendant.	

Upon the issues made by the pleadings in this case it is stipulated as follows, viz:

1st. That plaintiff is and was during the times mentioned in the

petition a corporation duly organized and existing by virtue of the laws of the State of Illinois, with its principal office in the city of East St. Louis, in said State; that it is engaged in the business of furnishing refrigerator cars for the transportation of perishable products over the various lines of railroads in the United States;

29 that these cars are more expensive than the ordinary box or freight car; that the cars herein referred to are the sole and exclusive property of the plaintiff, and that the plaintiff furnishes the same to be run indiscriminately over any lines of railroad over which shippers or said railroads may desire to route them in shipping, and furnishes the same for the transportation of perishable freight upon the direct request of shippers or of railroad companies requesting the same on behalf of the shipper, but on the responsibility of the carrier and not of the shipper; that as compensation for the use of its cars plaintiff receives a mileage of three-fourths of a cent per mile run from each railroad company over whose lines said cars are run, such rate of payment being the same as is paid by all railroad companies to each other for the use of the ordinary freight cars of each when used on the lines of others in the exchange of cars incident to through transportation of freight over connecting lines of railroads; that plaintiff has not and never has had any contract of any kind whatsoever by which its cars are leased or allotted to or by which it agrees to furnish its cars to any railroad company operating within the State of Colorado; that it has and has had during said times no office or place of business, nor other property than its cars, within the State of Colorado, and that all the freight transported in plaintiff's cars in or through the State of Colorado, including the cars assessed, was transported in such cars either from a point or points in a State of the United States outside of the State of Colorado to a point in the State of Colorado or from a point in the State of Colorado to a point outside of said State, or between points wholly outside of said State of Colorado, and said cars never were run in said State in fixed numbers, nor at regular times, nor as a regular part of particular trains, nor were any certain
30 cars ever in the State of Colorado, except as engaged in such business aforesaid, and then only transiently present in said State for such purposes.

That, owing to the varying and irregular demands for such cars, the various railroad companies within the State of Colorado have not deemed it a profitable investment to build or own cars of such character, and therefore relied upon securing such cars when needed from the plaintiff or corporations doing a like business.

That it is necessary for the railroad companies operating within the State of Colorado, and which are required to carry over their lines perishable freight, such as fruits, meats, and the like, to have such character of cars wherein they can safely transport such character of freight.

2nd. That the average number of cars of the plaintiff used in the course of the business aforesaid within the State of Colorado during the year for which such assessment was made would equal forty, and that the cash value of plaintiff's cars exceed the sum of two

hundred dollars per car, and that if such property of the plaintiff is assessable and taxable within such State of Colorado, then the amount for which such cars, the property of the plaintiff, is assessed by said State board of equalization is just and reasonable and not in excess of the value placed upon like property within said State for the purposes of taxation.

3rd. That said company is not doing business in this State except as shown in this stipulation and by the facts admitted in the pleadings.

4th. That in case it be found by the court, under the undisputed facts set forth in the pleadings and the facts herein stipulated, that the authorities of the State of Colorado under existing laws
31 have no power to assess or tax the said property of plaintiff, then judgment shall be entered herein for the plaintiff for the relief prayed; otherwise judgment shall be entered for the defendant.

PERCY WERNER AND
C. M. KENDALL,

Attorneys for Plaintiff.

GOUDY & TWITCHELL,

Attorneys for Defendant.

Thereupon the cause was argued by counsel and submitted to the court upon the pleadings and the foregoing statement of facts, there being no other testimony given or offered; whereupon the court made its finding herein, finding the issues herein joined for the plaintiff.

To which finding of the court the said defendant, by his counsel, then and there duly excepted.

Thereupon judgment was entered in favor of the plaintiff in accordance with the finding of the court.

To the entering of which judgment the said defendant, by his counsel, then and there duly excepted.

Thereupon the defendant, by his counsel, prayed an appeal to the supreme court of the State of Colorado, which was allowed by the court upon condition that the said defendant file herein, within thirty days from this date, his bond of appeal in the penal sum of three hundred dollars, with sureties to be approved by the clerk of this court, and that the said defendant have time and until thirty days from this date within which to prepare and tender to the judge of this court his bill of exceptions by him reserved herein.

32 And now, forasmuch as the above and foregoing matters and things do not fully appear of record herein, the said defendant presents this his bill of exceptions and prays the court that the same may be signed, sealed, and made a part of the record herein pursuant to the statute in such cases made and provided, which is accordingly done on this the first day of October, A. D. 1896.

C. P. BUTLER, *Judge.* [SEAL.]

Tendered to me by counsel for the defendant on this first day of October, A. D. 1896.

— —, Judge.

"O K."

PERCY WERNER AND

C. M. KENDALL,

Attorneys for Plaintiff.

(Endorsed :) 24063. American Refrigerator Transit Co. *vs.* Frank Hall, treas. Arap. Co. Bill of exceptions. Filed in district court, Arapahoe county, Colo., Oct. 2, 1896, as of Sept. 19, '96. G. S. Richards, clerk.

33 In the Supreme Court of the State of Colorado.

FRANK HALL, Treasurer of Arapahoe County, Colorado, Plaintiff }
in Error,

vs.

THE AMERICAN REFRIGERATOR TRANSIT COMPANY, a Corpora- }
tion, Defendant in Error.

Assignment of Errors.

Comes now the plaintiff in error and shows to the court that there is manifest and material error in the pleadings and proceedings in this cause in the court below ; that the judgment of the court below should be reversed on account of the many and material errors contained in this record, as follows, to wit:

I.

The court below erred in overruling defendant's demurrer to plaintiff's complaint.

II.

The court below erred in rendering judgment in favor of the plaintiff upon the final hearing in said cause and making the temporary injunction perpetual ; to the rendering and entering of which judgment defendant below, by counsel, then and there duly excepted.

III.

The court below erred in not rendering and entering judgment in favor of the defendant below upon the final hearing of the issues joined in said cause.

34

IV.

The court below erred in holding that the authorities of the State of Colorado under existing laws had no power to assess or tax the said property of plaintiff below.

V.

And by reason of said errors and divers other errors committed by the court below in the proceedings in said cause, as appears upon

the face of the record herein, plaintiff in error prays that the judgment of the court below may be reversed and said cause remanded with direction to dismiss plaintiff's complaint.

GOUDY & TWITCHELL,

Attorneys for Plaintiff in Error.

(Endorsed :) 3716. In supreme court, State of Colorado. Frank Hall, treas. of Arapahoe county, Colorado, pl'ff in error, *vs.* The American Refrigerator Transit Co., a corporation, d'f't in error. Transcript of record, bill of exceptions, and assignment of errors. Filed in supreme court this 14th day of Nov., 1896. James A. Miller, clerk.

And afterwards and on, to wit, October 19th, A. D. 1897, the same being a juridical day of the September, A. D. 1897, term of
35 said supreme court—present, Honorable Charles D. Hayt, chief justice; Honorable Luther M. Goddard, Honorable John Campbell, judges; Byron L. Carr, attorney general; Felix A. Richardson, bailiff, and James A. Miller, clerk—the following proceedings were had in said cause, to wit:

FRANK HALL, Treasurer of Arapahoe County, Colorado, Plaintiff in Error,	}	3716. Error to the District Court of Arapahoe County.
<i>vs.</i> THE AMERICAN REFRIGERATOR TRANSIT Company, a Corporation, Defendant in Error.		

Now comes Byron L. Carr, Esquire, attorney general, and Frank C. Goudy and L. F. Twitchell, Esquires, attorneys for plaintiff in error, and defendant in error, by Garland Pollard, Percy Werner, and C. M. Kendall, Esquires, its attorneys, also comes; and thereupon this cause is argued orally by the parties herein and submitted to the consideration and judgment of the court.

And on, to wit, December 6th, A. D. 1897, the same being a regular juridical day of the September, A. D. 1897, term of this supreme court—present, Honorable Charles D. Hayt, chief justice; Honorable Luther M. Goddard, Honorable John Campbell, judges;
Byron L. Carr, attorney general; Felix A. Richardson, bailiff.
36 and James A. Miller, clerk—the following further proceedings were had and entered of record in said cause, to wit:

FRANK HALL, Treasurer of Arapahoe County, Colorado, Plaintiff in Error,	}	3716. Error to Dis- trict Court of Arapahoe County.
<i>vs.</i> THE AMERICAN REFRIGERATOR TRANSIT Company, a Corporation, Defendant in Error.		

At this day this cause coming on to be heard as well upon the transcript of proceedings and judgment in said district court in and for the county of Arapahoe as also upon the matters assigned for

error herein, and the same having been heretofore argued by counsel and submitted to the consideration and judgment of the court, and it appearing to the court that there is manifest error in the proceedings and judgment aforesaid of said district court, it is therefore—

Considered and adjudged by the court that the judgment aforesaid of said district court be, and the same is hereby, reversed, annulled, and altogether held for naught, and that this cause be remanded to said district court with directions to dismiss the action. It is further—

Considered and adjudged by the court that said plaintiff in error do have and recover of and from said defendant in error his costs in this behalf expended, to be taxed, and that he have execution therefor; and let the opinion of the court filed herein be recorded

And on the same day as last aforesaid said court filed in the office of the clerk of said supreme court its opinion in said cause in words and figures as follows, to wit:

37	FRANK HALL, Treasurer of Arapahoe County, Colorado, Plaintiff in Error,	} No. 3716.
	v.	
THE AMERICAN REFRIGERATOR TRANSIT COMPANY, a Corporation, Defendant in Error.		

Error to the district court of Arapahoe county.

This is an action brought by The American Refrigerator Transit Company, the defendant in error, to have a certain tax declared null and void, and to restrain plaintiff in error, as treasurer of Arapahoe county, from collecting the same. The receiver of the Union Pacific, Denver & Gulf Railway Company, in pursuance of the requirements of section 1 of the Session Laws of 1891, pp. 290, 291 (§ 3804, M. A. S.), reported to the State board of equalization that he had in use on the line of railway operated by him during the year ending December 31st, 1894, forty-two refrigerator cars belonging to defendant in error; and thereupon the State board of equalization assessed to defendant in error said forty-two cars, at a valuation of \$250 each, or a total valuation of \$10,500, and distributed said assessment to the different counties through which the line of railway extended upon which said cars were used according to the mileage in said counties respectively; that of such assessment \$750 was distributed to Arapahoe county. The county assessor of Arapahoe county made out a tax-list based on such assessment and delivered said list to plaintiff in error, as county treasurer of

38 said county, with his warrant attached thereto, for the collection of the sum of \$21.63, being the amount of taxes so assessed against plaintiff; which amount the plaintiff in error was proceeding to collect by distraint and sale of the property of defendant in error. The cause was tried to the court upon the following agreed statement of facts:

"Upon the issues made by the pleadings in this case it is stipulated as follows, viz:

1st. That plaintiff is and was during the times mentioned in the petition a corporation duly organized and existing by virtue of the laws of the State of Illinois, with its principal office in the city of East St. Louis, in said State; that it is engaged in the business of furnishing refrigerator cars for the transportation of perishable products over the various lines of railroads in the United States; that these cars are more expensive than the ordinary box or freight car; that the cars referred to are the sole and exclusive property of the plaintiff, and that the plaintiff furnishes the same to be run indiscriminately over any lines of railroad over which shippers or said railroads may desire to route them in shipping, and furnishes the same for transportation of perishable freight upon the direct request of shippers or of railroad companies requesting the same on behalf of shippers, but on the responsibility of the carrier and not of the shipper; that as compensation for the use of its cars plaintiff received a mileage of three-fourths of a cent per mile run from each railroad company over whose lines said cars are run, such rate of payment being the same as is paid by all railroad companies to each other for the use of the ordinary freight cars of each when used on the lines of others in the exchange of cars incident to through transportation of freight over connecting lines of railroads; that plaintiff has no and never has had any contract of any kind whatsoever by which its cars are leased or allotted

to or by which it agrees to furnish its cars to any railroad company operating within the State of Colorado; that 39 it has and has had during said times no office or place of business nor other property than its cars within the State of Colorado, and that all the freight transported in plaintiff's cars in or through the State of Colorado, including the cars assessed, was transported in such cars either from a point or points in a State of the United States outside of the State of Colorado to a point in the State of Colorado, or from a point in the State of Colorado to a point outside of said State, or between points wholly outside of said State of Colorado, and said cars never were run in said State in fixed numbers nor at regular times, nor as a regular part of particular trains, nor were any certain cars ever in the State of Colorado, except as engaged in such business aforesaid, and then only transiently present in said State for such purposes.

That, owing to the varying and irregular demand for such cars, the various railroad companies within the State of Colorado have not deemed it a profitable investment to build or own cars of such character, and therefore relied upon securing such cars when needed from the plaintiff or corporations doing a like business.

That it is necessary for the railroad companies operating within the State of Colorado and which are required to carry over their lines perishable freight, such as fruits, meats, and the like, to have such character of cars wherein they can safely transport such character of freight.

2nd. That the average number of cars of the plaintiff used in the course of the business aforesaid within the State of Colorado during the year for which such assessment was made would equal forty,

and that the cash value of plaintiff's cars exceed- the sum of \$250 per car, and that if such property of the plaintiff is assessable and taxable within such State of Colorado, then the amount for which such cars, the property of the plaintiff, is assessed by said
40 State board of equalization is just and reasonable and not in excess of the value placed upon other like property within said State for the purposes of taxation.

3rd. That said company is not doing business in this State, except as shown in this stipulation and by the facts admitted in the pleadings.

4th. That in case it be found by the court under the undisputed facts set forth in the pleadings and the facts herein stipulated that the authorities of the State of Colorado under existing laws have no power to assess or tax the said property of plaintiff, then judgment shall be entered herein for the plaintiff for the relief prayed; otherwise judgment shall be entered for the defendant."

The following constitutional and statutory provisions are referred to in the opinion:

"All corporations in this State, or doing business therein, shall be subject to taxation for State, county, school, municipal and other purposes, on the real and personal property owned or used by them within the territorial limits of the authority levying the tax." § 10, art. 10, State const.

SEC. 3765 (M. A. S.): "All property, both real and personal, within the State, not expressly exempt by law, shall be subject to taxation.

* * *

"SEC. 3804. * * * It shall be the duty of said board (the board of equalization) to assess all the property in this State owned, used or controlled by railway companies, telegraph, telephone and sleeping or palace car companies."

41 "SEC. 3805. The president, vice-president, general superintendent, auditor, tax agent, or some other officer of such railway, sleeping or other palace —, or telegraph or telephone company, or corporation, owning, operating, controlling or having in its possession in this State any property, shall furnish said board on or before the fifteenth day of March, in each year, a statement signed and sworn to by one of such officers, and showing in detail for the year ending on the thirty-first day of December preceding * * *

Fifth. A full list of rolling stock belonging to or operated by such railway company, setting forth the number, class and value of all locomotives, passenger cars, sleeping cars or other palace cars, express cars, baggage cars, mail cars, box cars, cattle cars, coal cars, platform cars, and all other kinds of cars owned or used by said company. The statement shall show the actual proportion of the rolling stock in use on the company's road, all of which is necessary for the transportation of freight and passengers, and the operation of the road within the State during the year for which the statement is made. The said statement shall also show the actual proportion of rolling stock of said company used upon leased lines and lines operated with others within the State, the mileage so leased and operated and the location thereof. * * *

Seventh. * * * Whenever it shall be found that one corporation uses or controls any property belonging to or owned by another corporation, said board may assess such property either to the corporation using or controlling the same, or to the corporation by which it is owned or to which it belongs. But every such corporation shall, in the statement to said board, set forth what property belonging to or owned by any other corporation is used or controlled by the corporation making the statement."

42 The court below found the issues in favor of the company and rendered a decree granting the relief prayed for. To reverse this decree the treasurer brings the case here on error.

Mr. Justice GODDARD delivered the opinion of the court:

The power of the State to levy the tax in question is challenged by defendant in error upon three grounds: First, because the cars, being only transiently present within the State from time to time, acquired no such situs within the State as is necessary to give the State jurisdiction over them for the purposes of taxation; second, because such taxation would amount to a regulation of interstate commerce, and thus be repugnant to the exclusive power vested in Congress to regulate such commerce; third, because, even if taxable within this State, no proper provision has been made by the legislature to assess and tax such property.

The first objection presents what we regard as the difficult question in the case, and its solution necessitates an inquiry as to the meaning of and effect to be given to the foregoing constitutional and statutory provisions. It will be seen by reference thereto that it is made the duty of the State board of equalization to assess all the property in this State owned, used, or controlled by railway companies, etc., and it is made the duty of the officers of such companies to furnish the State board of equalization, on or before March 15th of each year, a statement showing in detail for the year ending on December 31 preceding "a full list of rolling stock belonging to or operated by such railway company. * * *

43 The statement shall show the actual proportion of the rolling stock in use on the company's road, all of which is necessary for the transportation of freight and passengers and the operation of the road within the State during the year for which the statement is made."

The right of the State to tax all subjects within its jurisdiction is unquestionable, and this right may, in the discretion of the legislature, be exercised over all property coming temporarily within its territory, whether for trade, business, or convenience, unless such exercise conflicts with some constitutional limitation.

R. R. Co. v. Peniston, 18 Wall., 5.

Lane Co. v. Ore., 7 Wall., 71.

Pullman's Palace Car Co. v. Pa., 141 U. S., 18.

25 Am. & Eng. Enc. of Law, p. 18.

As was said in Pullman's Palace Car Co. v. Pa.: "The State, having the right for the purposes of taxation to tax any personal prop-

erty found within its jurisdiction, without regard to the place of the owner's domicile, could tax the specific cars which at a given moment were within its borders."

It is clearly manifest that the purpose of these constitutional and statutory provisions is to subject all property owned or used by a railway or other corporation within the territorial limits of the State to taxation according to its value, regardless of the domicile of its owner, and in so doing they exercise a well recognized function of legislation.

"For the purposes of taxation, as has been repeatedly affirmed by this court, personal property may be separated from its owner, and he may be taxed on its account at the place where it is, although not the place of his domicile, and even if he is not a citizen or a resident of the State which imposes the tax."

Pullman's Palace Car Co. v. Pa., supra.

While it is true, as stated by counsel for defendant in error, that it has been uniformly held that property merely in transit through a State acquires no situs for the purposes of taxation, and
 44 it may be further conceded that the property so in transit would not, within the letter and spirit of our legislation, acquire such situs, yet it by no means follows that the cars in question are entitled to exemption under this rule. As shown by the agreed statement of facts, these cars are more expensive than the ordinary freight cars, and the various railway companies within the State of Colorado have not deemed it a profitable investment to build or own such cars, and therefore rely upon securing them from defendant in error or like corporations when needed; that it is necessary for the railroad companies operating within the State of Colorado to have such character of cars in order to transport over their respective lines perishable freight, and if they could not secure them when needed, it would be necessary for them to own and keep them as a part of their rolling stock; the sum and substance of which amounts to this: That such cars are a part of the necessary equipment of the different railroads using them in the State and as essential to the transaction of their business as any other portion of their rolling stock. While it appears that said cars are not run in the State in fixed numbers or at regular times, and that certain or specific cars are only transiently in the State, yet it is shown that the average number of cars used in the course of the business aforesaid within the State during the year for which such assessment was made was equal to forty. Under these circumstances we think the effect of our legislation is to give to the cars in question a situs for the purpose of taxation, and that they were "habitually used and employed" in the State, in the sense that these words are used in *Marye v. Baltimore and O. R'y Co.*, 127 U. S., 117, and are assessable under the rule therein announced. Mr. Justice Matthews, who delivered the opinion of the court, in upholding the right of the State of Virginia to tax the B. & O. R'y Co., whose situs was in
 45 Maryland, upon rolling stock used interchangeably upon the main line and branches of its road in the States of Maryland,

Virginia, Pennsylvania, and States west of the Ohio river, as the necessities of the company required, said :

" If the Baltimore and Ohio Railroad Company is permitted by the State of Virginia to bring into its territory and there habitually to use and employ a portion of its movable personal property, and the railroad company chooses so to do, it would certainly be competent and legitimate for the State to impose upon such property thus used and employed its fair share of the burdens of taxation imposed upon other similar property used in the like way by its own citizens."

The status of the cars in question was also substantially like that of those under consideration in *Pullman's P. Car Co. v. Pa.*, *supra*, in that there was an average number in use within the State during the period for which the tax was levied, and we think that under the reasoning of that case they were subject to taxation in this State.

Pickard v. Pullman Southern Car Company, 117 U. S., 34, and *Pullman Southern Car Company v. Nolan*, 22 Federal Reporter, 276, are mainly relied on as sustaining a contrary view. While the court uses general expressions touching the question of situs that seem to sustain the contention of defendant in error, it is to be observed that the question then under consideration was the validity of a license or privilege tax imposed upon cars employed in interstate commerce, and the language touching the situs of the property was used with reference to the right of a State to impose such a tax, and not as to its jurisdiction to impose a property tax as in the case under consideration. In *Pullman's Palace Car Company v. Pa.*, *supra*,

Mr. Justice Gray, referring to these and kindred cases, says :
46 " Much reliance is also placed by plaintiff in error upon the cases in which this court has decided that citizens or corporations of one State cannot be taxed by another State for a license or privilege to carry on interstate or foreign commerce within its limits ; but in each of those cases the tax was not upon the property employed in that business, but upon the right to carry on the business at all, and was thereby held to impose a direct burden upon the commerce itself."

It will be readily seen, therefore, that the expressions of the court in regard to the question of situs could have no significance or bearing upon that question as presented in this case. If it can be said that the court in those cases intended to hold that under the conditions therein disclosed the cars acquired no situs that would subject them to a property tax, then its finding was in direct conflict with the conclusion reached in the later cases above referred to.

The tax now under consideration is not a license tax, or in any sense a tax for the privilege of transacting interstate commerce, but only a property tax imposed upon certain cars employed in such commerce. The second objection urged against its validity is therefore clearly untenable. The power of a State to impose such a tax is too well settled to admit of discussion. As was said by Mr. Justice Brewer in passing upon the petition for rehearing in *Adams Express Company v. Ohio*, 166 U. S., 185 :

"Again and again has this court affirmed the proposition that no State can interfere with interstate commerce through the imposition of a tax, by whatever name called, which is in effect a tax for the privilege of transacting such commerce; and it has as often affirmed that such restriction upon the power of a State to interfere with interstate commerce does not in the least degree abridge the
47 right of a State to tax at their full value all the instrumentalities used for such commerce."

And as was said by Mr. Justice Gray in *Pullman's Palace Car Company v. Pa.*, *supra*:

"The cars of this company within the State of Pennsylvania are employed in interstate commerce, but their being so employed does not exempt them from taxation by the State, and the State has not taxed them because of their being so employed, but because of their being within its territory and jurisdiction."

To the same effect are *The Postal Tel. Cable Co. v. Adams*, 155 U. S., 688, and the original opinion in *Adams Ex. Co. v. Ohio*, 165 U. S., 194, in which this question is fully discussed and authorities reviewed.

In the view we take touching the situs of the property but little remains to be said upon the question presented by the third objection, since the reasons advanced in its support are mainly those relied on as sustaining the claim of defendant in error that its cars were only transiently here, and were not "used or controlled" in the State within the meaning of our statute, an assumption that we have found to be unwarranted under the agreed facts in the case. Constituting, as we have seen, a part of the necessary equipment of the railroad company using them, the cars clearly come within the class of property intended to be reached by the foregoing legislation, and consequently within the jurisdiction of the State board of equalization to assess and tax them. That the procedure prescribed furnishes a mode convenient and equitable to all concerned for the valuation and taxation of this class of property is settled by prior decisions of this court.

Carlisle v. Pullman Palace Car Co., 8 Colo., 320.

Denver & Rio Grande R'y Co. v. Church, 17 Colo., 1.

48 And the right to base the assessment upon the average number of cars in use within the State during the year is recognized in *Pullman's Palace Car Co. v. Pa.*, *supra*, and expressly upheld in *Marye v. B. & Ohio R'y Co.*, *supra*.

In the opinion quoted from, Justice Matthews says: "And such a tax might be properly assessed and collected in cases like the present, where the specific and individual items of property so used and employed were not continuously the same, but were constantly changing, according to the exigencies of the business. In such cases the tax might be fixed by an appraisement and valuation of the average amount of the property thus habitually used."

Our conclusion, therefore, is that the tax in question is not obnoxious to either of the objections urged against it, and the court below erred in restraining its collection. Its judgment is accord-

ingly reversed and the cause remanded with direction to the court below to dismiss the action.

Reversed.

(Endorsed:) Filed in supreme court Dec. 6, 1897. James A. Miller, clerk.

To which judgment and opinion of the court the defendant in error then and there excepted.

49 And afterwards and on, to wit, December 17th, A. D. 1897, came said defendant in error, by its attorney, C. M. Kendall, Esq., and filed herein its petition for a writ of error from the Supreme Court of the United States to this supreme court; which said petition and the allowance of said writ of error endorsed thereon is as follows, to wit:

In the Supreme Court of the State of Colorado.

FRANK HALL, Treasurer of Arapahoe County, Colorado,	} No. 3716.
Plaintiff in Error,	
vs.	
THE AMERICAN REFRIGERATOR TRANSIT COMPANY, a	}
Corporation, Defendant in Error.	

Petition for Writ of Error from the Supreme Court of the United States to the Supreme Court of the State of Colorado.

To the said court and the Hon. Charles D. Hayt, chief justice thereof:

And now comes the said The American Refrigerator Transit Company, a corporation, by Percy Werner and Charles M. Kendall, its attorneys, and complains that in the record and proceedings, and also in the rendition of a judgment in a suit between Frank Hall, treasurer of Arapahoe county, Colorado, the plaintiff in error, in the supreme court of the State of Colorado, and The American Refrigerator Transit Company, a corporation, the defendant

50 in error, in the supreme court of the State of Colorado, being the highest court of law or equity of the said State in which a decision could be had in said suit and in which a final judgment was rendered against the said The American Refrigerator Transit Company on the 6th day of December, 1897, in said suit, wherein there was drawn by your petitioner in question the validity of a statute of the State of Colorado and an authority exercised under said State, on the ground of their being repugnant to the Constitution of the United States, and the decision was in favor of the validity of said statute and of the authority exercised under said State, and where a right, privilege, and immunity was claimed by your petitioner under the Constitution of the United States and the decision was against said right, privilege, and immunity, manifest error hath happened, to the great damage of your petitioner.

Petitioner further alleges and shows that in said suit, in the dis-

trict court of the first judicial district of the State of Colorado, sitting in and for the county of Arapahoe, the said The American Refrigerator Transit Company, as plaintiff, brought its action against Frank Hall, the treasurer of Arapahoe county, Colorado, as defendant, to enjoin the collection by said treasurer of a certain tax assessed by the State board¹ of equalization of the State of Colorado, claiming to act under the authority of the Session Laws of the State of Colorado for 1891, pages 292 and 293, being an act entitled "An act to provide for the better assessment and collection of revenue; to prescribe the duties of the State board of equalization, State and county officers, in relation thereto; to provide a penalty for the failure or neglect of duty in connection therewith, and to repeal all acts or parts of acts in conflict with this act," approved April 13th,

- 1891, upon the property mentioned in the complaint therein,
- 51 your petitioner claiming that said property was in said State only temporarily in transit, engaged exclusively in interstate-commerce business, and that said property was only temporarily in said State in the transaction of said business and had no situs therein, and that said State had no jurisdiction over said property, and that the assessment of same by the State board of equalization was unauthorized and void and in violation of the provision of the United States Constitution vesting in Congress of the United States the exclusive power to regulate commerce among the several States of the United States, and that said act of the legislature of the State of Colorado and the authority attempted to be exercised thereunder by the State board of equalization of the State of Colorado and by said treasurer in the collection of said tax was in violation of said provision of the Constitution of the United States and of subdivision 3 of section VIII of article 1 of said Constitution; which said claim by your petitioner was sustained by said district court of Arapahoe county and a final decree entered therein perpetually enjoining the said Hall, treasurer, defendant in said lower court, from collecting said tax, which decree was duly entered in said district court of Arapahoe county on the 19th day of September, 1896, to review which said Hall, treasurer, as plaintiff in error, sued out a writ of error from the supreme court of the State of Colorado, and thereupon due return was made to said writ and the record of said proceedings in the district court of Arapahoe county filed in and said cause removed to the supreme court of the State of Colorado, and the supreme court of the State of Colorado heard said cause upon said record and the arguments of the respective parties thereto, in which court your petitioner duly claimed that said statute of the State of Colorado and the authority exercised thereunder by the State of Colorado and said State board of equalization and said
- 52 treasurer were repugnant to the Constitution of the United States, and the said provision thereof vesting in the Congress of the United States the exclusive power to regulate commerce among the States, and that your petitioner's property was exclusively engaged in interstate commerce and only temporarily present in said State in transit in said business and had no situs in said State, and that said State of Colorado had no juris-

diction over the same, and that your petitioner and said property were under said United States Constitution exempt from taxation by the authorities of the State of Colorado, and petitioner alleges that a decision of said question was necessary to determine the rights of said parties; but said supreme court of the State of Colorado rendered its decision on the 6th day of December, 1897, in favor of the validity of said statute and said authority and entered its final decree and judgment herein, being the judgment first herein mentioned, holding that said statute and said authority so exercised by said State were not in violation of the Constitution of the United States or said provision thereof and reversed the said decree of the district court of Arapahoe county, and directed that your petitioner's complaint in said court be dismissed; all of which more fully appears by the records and proceedings herein, to which reference is hereby made, and in which said record and proceedings manifest error hath happened, to the great damage of the said American Refrigerator Transit Company.

Wherefore it prays for the allowance of a writ of error and such other processes as may cause the same to be corrected by the Supreme Court of the United States.

PERCY WERNER AND
C. M. KENDALL,

*Attorneys for the American Refrigerator Transit Company,
Petitioner, the said Defendant in Error in the Supreme
Court of Colorado.*

I hereby certify that a Federal question was duly raised and decided in the foregoing case, substantially as set forth in the
53 foregoing petition, and the said writ of error from the Supreme Court of the United States is hereby allowed this 17th day of December, A. D. 1897, and the bond on said writ of error to be given in the sum of five hundred dollars (\$500).

CHARLES D. HAYT,
Chief Justice of the Supreme Court of the State of Colorado.

(Endorsed :) 3716. In the supreme court of the State of Colorado. Frank Hall, treasurer of Arapahoe county, Colorado, vs. The American Refrigerator Transit Company, a corporation. Filed in supreme court Dec. 17, 1897. James A. Miller, clerk. Petition for writ of error from the Supreme Court of the United States to the supreme court of the State of Colorado. Percy Werner & C. M. Kendall, attorneys for petitioner.

And afterwards and on, to wit, December 22nd, A. D. 1897, came said defendant in error and filed, in pursuance of the order of the chief justice of this court, its bond; which said bond and the approval endorsed thereon is as follows, to wit:

THE UNITED STATES OF AMERICA, {
District of Colorado.

Know all men by these presents that we, The American Refrigerator Transit Company, a corporation, as principal, and the Fidelity

54 and Deposit Company of Maryland, a corporation, as surety, are held and firmly bound unto Frank Hall, treasurer of Arapahoe county, Colorado, in the full and just sum of five hundred (500) dollars, to be paid to the said Frank Hall, treasurer of Arapahoe county, Colorado; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, administrators, and successors, jointly and severally, firmly by these presents.

Sealed with our seals and dated this — day of December, in the year of our Lord one thousand eight hundred and ninety-seven.

Whereas lately, at the September term, A. D. 1897, of the supreme court of the State of Colorado, in a suit pending in said court between Frank Hall, treasurer of Arapahoe county, Colorado, *is* plaintiff in error, and The American Refrigerator Transit Company, *is* defendant in error, judgment was rendered against the said The American Refrigerator Transit Company on the 6th day of December, 1897, and the said The American Refrigerator Transit Company having obtained a writ of error of the said United States Supreme Court to reverse the judgment in the aforesaid suit, and a citation directed to the said Frank Hall, treasurer of Arapahoe county, Colorado, citing and admonishing him to be and appear in the Supreme Court of the United States, at Washington, D. C., thirty days after the date of said citation:

Now, the condition of the above obligation is such that if the said The American Refrigerator Transit Company shall prosecute said writ to effect and answer all costs if it fails to make good its plea, then the above obligation to be void; else to remain in full force and virtue.

THE AMERICAN REFRIGERATOR
TRANSIT CO.,

By REID NORTHROP, *President*. [SEAL.]

Attest: PERCY WERNER, *Sec'y*.

[SEAL.]

55

THE FIDELITY AND DEPOSIT CO.
OF MD.,

By GUY LE R. STEVICK, [SEAL.]

Member of Local Board.

[SEAL.]

Attest: WM. G. MAITLAND,
For CHAPMAN & MAITLAND,

General Agents.

Approved:

CHARLES D. HAYT,
Chief Justice of Colorado.

STATE OF COLORADO, }
County of Arapahoe, } ss:

Guy Le R. Stevick, being a member of the local board of directors of the Fidelity & Deposit Company of Maryland, the surety in the foregoing bond, and Wm. G. Maitland, being a member of the firm of Chapman & Maitland, the duly authorized agents of the said The

Fidelity & Deposit Company of Maryland, being duly sworn, depose and say that the said surety company is a corporation of the State of Maryland, duly and legally carrying on the business of a surety company in the State of Colorado; that said surety company has fully complied with the laws of the State of Colorado relating to foreign corporations doing business in this State; that affiants are respectively the officers and agents of the said company, as hereinbefore stated, and that as such officers and agents they are duly authorized to execute the bond hereto annexed on behalf of the said company; that said surety company is authorized by its articles of incorporation and by its by-laws to execute the bond hereto annexed on behalf of the said company, and that said company has assets consisting of capital stock paid up in cash and surplus, over and above all of its liabilities, exceeding the sum of \$2,000,000.00 dollars.

56

GUY LE R. STEVICK.
WM. G. MAITLAND.

Subscribed and sworn to before me this 22nd day of Dec'r, A. D. 1897.

My commission will expire Feb'y 18, 1901.

MAUDE L. SILVEY,
Notary Public.

[SEAL.]

57 STATE OF COLORADO:

In the Supreme Court.

FRANK HALL, Treasurer of Arapahoe County,
Colorado, Plaintiff in Error,

vs.

THE AMERICAN REFRIGERATOR TRANSIT COM-
pany, a Corporation, Defendant in Error.

No. 3716. Error
to the District
Court of Arapa-
hoe County.

I, James A. Miller, clerk of the supreme court of the State of Colorado, do hereby certify that the foregoing is a true copy of an original transcript of the record of proceedings in a certain cause lately pending in the district court of Arapahoe county, wherein The American Refrigerator Transit Company was plaintiff and Frank Hall, treasurer of Arapahoe county, Colorado, was defendant, and brought into this court for review upon writ of error to said district court, as also true and complete transcript of the judgment and opinion of this court in said cause, the petition of said The American Refrigerator Transit Company for the allowance of a writ of error from the Supreme Court of the United States to this supreme court, with the allowance endorsed thereon, and the bond and approval thereof, to which record I have attached the original writ of error and *scire facias*, with service thereof acknowledged thereon.

Witness my hand and the seal of said supreme court, affixed at my office, in the city of Denver, this 4th day of January, A. D. 1898.

Seal Supreme Court,
State of Colorado.

JAMES A. MILLER, Clerk.

58 In the Supreme Court of the United States, October Term,
1897.

THE AMERICAN REFRIGERATOR TRANSIT Company, Plaintiff in Error,	} Error to Supreme Court of Colorado.
vs.	
FRANK HALL, Treasurer of Arapahoe County, Colorado, Defendant in Error.	

Assignment of Errors.

And now comes The American Refrigerator Transit Company, plaintiff in error, by Percy Werner, its attorney, and says that in the record and proceedings aforesaid there is manifest error in this, to wit:

1. The supreme court of Colorado erred in holding that the property in controversy had an actual situs within the State of Colorado and was at the time for which the tax in question were levied within the jurisdiction of the taxing power of that State and taxable under its constitution and laws.

2. Said State court erred in deciding against the claim set up by plaintiff in error that the cars in question were in the State of Colorado only transiently and engaged exclusively in the business of interstate commerce, and that such taxation was in violation of the provision of the Federal Constitution granting to Congress the power "to regulate commerce * * * among the several States."

3. The State supreme court erred in giving judgment for the defendant in error when by the law of the land judgment should have been given for the plaintiff in error, and the said plaintiff in error prays that the said judgment aforesaid of the supreme court of Colorado may be reversed, annulled, and altogether held for nothing, and that it may be restored to all things which it hath lost by occasion of the said judgment, &c.

PERCY WERNER,

Attorney for Plaintiff in Error.

60 UNITED STATES OF AMERICA, ss.:

The President of the United States of America to the honorable the judges of the supreme court of the State of Colorado, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said the supreme court of the State of Colorado, before you or some of you, being the highest court of law or equity of the said State in which a decision could be had in the said suit between Frank Hall, treasurer of Arapahoe county, Colorado, is plaintiff in error and The American Refrigerator Transit Company, a corporation, is defendant in error, wherein was drawn in question the validity of a treaty or statute of or an authority exercised under the United States and the decision was against their validity, or wherein was drawn in question the validity of a statute of or an authority exercised under said State, on the ground of their being repugnant to the Constitution, treaties, or laws of the

United States, and the decision was in favor of such their validity, or wherein was drawn in question the construction of a clause
 61 of the Constitution or of a treaty or statute or of commission held under the United States and the decision was against the title, right, privilege, or exemption specially set up or claimed under such clause of the said Constitution, treaty, statute, or commission, a manifest error hath happened, to the great damage of the said The American Refrigerator Transit Company, a corporation, as by its complaint appears, we, being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court, at Washington, within 30 days from the date hereof, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, the 22d day of December, in the year of our Lord one thousand eight hundred and ninety-seven.

ROBERT BAILEY,
*Clerk of the Circuit Court of the United States,
 District of Colorado.*

Allowed by—
 CHARLES D. HAYT,
Chief Justice of Colorado.

62 [Endorsed:] The American Refrigerator Company, a corporation, pl'tf in error, vs. Frank Hall, treasurer of Arapahoe Co., Colorado, def't in error. Writ of error from Sup. Court of the U. S. to sup. court of Colorado. Filed in Supreme Court Dec. 22, 1897. James A. Miller, clerk.

STATE OF COLORADO, ss:

I, James A. Miller, do solemnly swear that I did, as clerk of the supreme court of Colorado, on this 27th day of December, 1897, mail in a sealed envelope, with the necessary United States postage thereon, to Goudy and Twitchell and L. F. Twitchell, county attorney of Arapahoe county, Colo., the attorneys for defendant in error herein, the copy of the writ of error from Supreme Court of the United States deposited with me for such purpose.

JAMES A. MILLER.

Subscribed and sworn to before me this 27th day of December, A. D. 1897.

[Seal Court of Appeals, State of Colorado.]

JAMES PERCHARD,
Clerk Court of Appeals of Colorado.

63 THE UNITED STATES OF AMERICA, }
State of Colorado.

The United States of America to Frank Hall, treasurer of Arapahoe county, Colorado, Greeting:

You are hereby cited and admonished to be and appear in the United States Supreme Court thirty (30) days from and after the day this citation bears date, pursuant to a writ of error filed in the clerk's office of the supreme court of the State of Colorado, wherein The American Refrigerator Transit Company, a corporation, is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected and why speedy justice should not be done the parties in that behalf.

Witness the Honorable Charles D. Hayt, chief justice of the supreme court of the State of Colorado, this 22nd day of December, in the year of our Lord one thousand eight hundred and ninety-seven.

[Seal Supreme Court, State of Colorado.]

CHARLES D. HAYT,
Chief Justice of the Supreme Court of the State of Colorado.

Attest: JAMES A. MILLER,
Clk Supreme Court, State of Colorado.

64 [Endorsed:] Gen No. —. United States Supreme Court.
 The American Refrigerator Transit Company, plaintiff in error, vs. Frank Hall, treasurer of Arapahoe county, Colorado, defendant in error. Citation. Filed in supreme court for the State of Colorado this 22 day of December, A. D. 1897. James A. Miller, clerk, by — — —, deputy clerk. C. M. Kendall, Percy Werner, attorneys for plaintiff in error.

Proof of Service.

THE UNITED STATES OF AMERICA, }
District of Colorado, } ss:

We hereby accept service of the within citation this 22nd day of December, A. D. 1897.

L. F. TWITCHELL,
County Attorney,
 GOUDY & TWITCHELL,
Attorneys for Frank Hall, Treasurer of
Arapahoe County, Colo., Defendant in Error.

Endorsed on covbr: Case No. 16,777. Colorado supreme court. Term No., 226. The American Refrigerator Transit Company, plaintiff in error, vs. Frank Hall, treasurer of Arapahoe county, Colorado. Filed January 15th, 1898.

No. 9
Brief

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JAN 26 1899

JAMES H. McKENNEY,
Clerk.

226.

Werner & Harmon for

Filed Jan 26, 1899.
Supreme Court of the United States.

OCTOBER TERM, 1898.

THE AMERICAN REFRIGER-
ATOR TRANSIT COMPANY.

Plaintiff in Error.

vs.

No. 226.

BANK HALL, TREASURER OF
ARAPAHOE COUNTY, COLORADO.

Defendant in Error.

IN ERROR TO THE SUPREME COURT OF COLORADO.

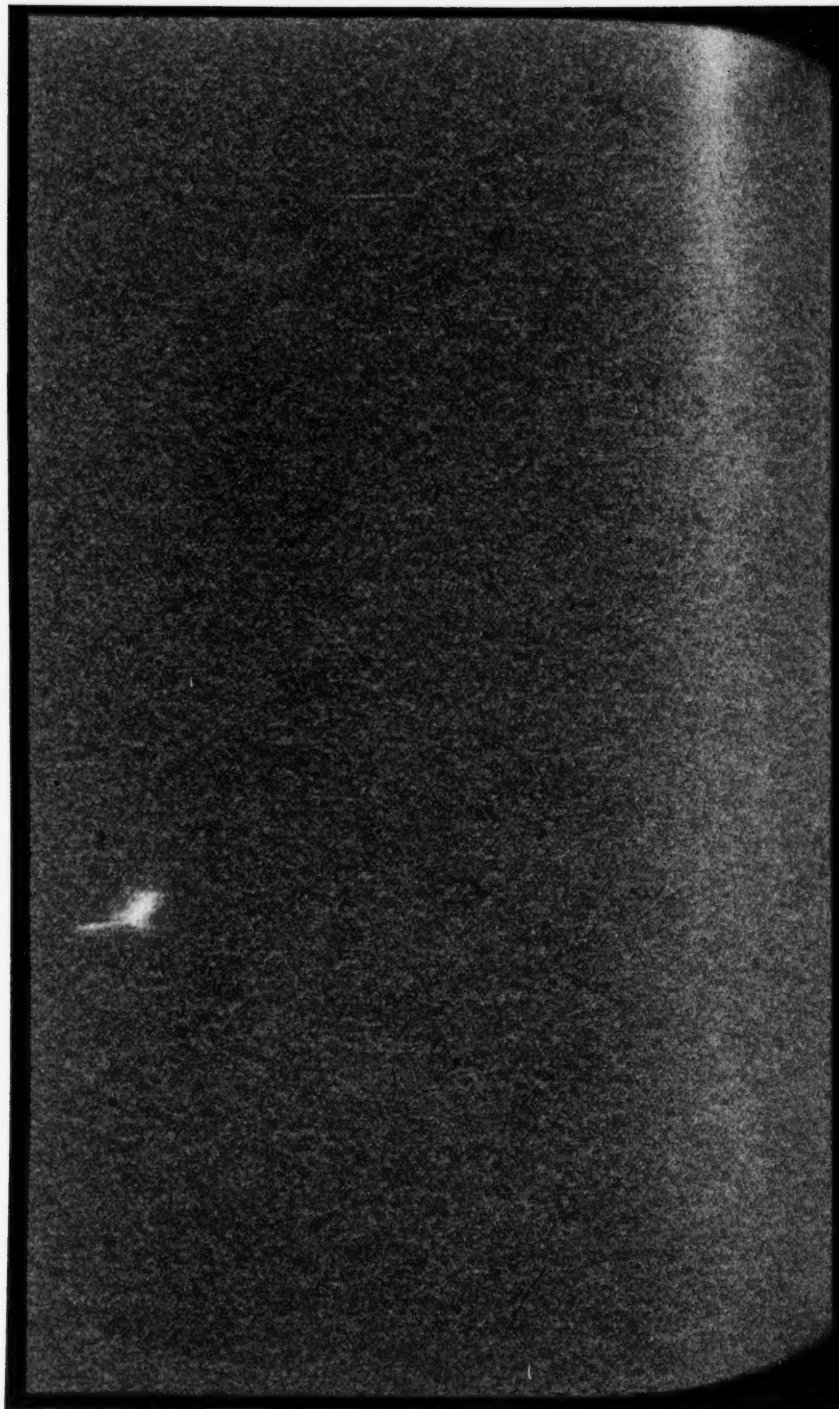
STATEMENT AND BRIEF OF PLAINTIFF
IN ERROR.

PERCY WERNER.

Attorney for Plaintiff in Error.

HUDSON HARMON.

Of Counsel.



IN THE
Supreme Court of the United States.

OCTOBER TERM, 1898.

THE AMERICAN REFRIGER-
ATOR TRANSIT COMPANY,
Plaintiff in Error,

vs.

FRANK HALL, TREASURER OF
ARAPAHOE COUNTY, COLORADO,
Defendant in Error.

No. 226.

IN ERROR TO THE SUPREME COURT OF COLORADO.

STATEMENT AND BRIEF OF PLAINTIFF
IN ERROR.

This was an action brought by the American Refrigerator Transit Company, the plaintiff in error, to have declared null and void, and to restrain the collection of, a certain property tax levied against it in Arapahoe County, Colorado, on an assessment of the Board of Equalization of that State to plaintiff in error of 42 cars at a valuation of \$250 each, and distributed to the different counties through which the line of railway extended, upon which said cars were run, according to the mileage in said counties re-

spectively. Of such assessment \$750 was distributed to Arapahoe County, upon which a tax of \$21.63 was levied by the local authorities.

The cause was submitted to the District Court of Arapahoe County upon an agreed statement of facts, which court found in favor of plaintiff in error, and rendered a decree granting the relief prayed for. This decree was, on writ of error, reversed by the Supreme Court of the State, and the case is here on a writ of error from that judgment.

Inasmuch as the issues of fact raised by the petition and answer were settled by an agreed statement of facts, it will be unnecessary to abstract the pleadings.

The material facts agreed upon, and upon which the cause was decided, are, as follows:

1st. The American Refrigerator Transit Company is a corporation organized and existing under and by virtue of the laws of the State of Illinois, with its principal office in the city of East St. Louis, in said State, and was engaged in the business of supplying refrigerator cars for the transportation of perishable products over the various lines of railroad in the United States.

2d. That the cars in question were the sole and exclusive property of plaintiff in error, and were furnished to shippers of perishable freight to be run indiscriminately over any lines of railroad the shippers, or railroads requesting them, on behalf of the shipper, might choose to route them.

3d. Plaintiff in error had no contract of any kind by which its cars were leased, allotted to or by which it agreed to furnish its cars to any railroad company operating within the State of Colorado; nor

had it an office or place of business, or property other than its cars, within said State.

4th. That all the freight transported in plaintiff's cars in or through the State of Colorado, including the cars assessed, was transported in such cars either from a point or points in a State of the United States outside of the State of Colorado, to a point in the State of Colorado, or from a point in the State of Colorado to a point outside of said State, or between points wholly outside of said State of Colorado, and said cars never were run in said State in fixed numbers nor at regular times, nor as a regular part of particular trains, nor were any certain cars ever in the State of Colorado except as engaged in such business aforesaid, and then only transiently present in said State for such business.

The agreed facts further showed that these refrigerator cars were more expensive than the ordinary box freight car; that they were furnished to shippers on the responsibility of the railroad companies as carriers, who paid a mileage for their use; that owing to the varying and irregular demands for such cars these railroad companies had not deemed it profitable to build and own them, but that such cars were necessary for the transportation of perishable freight, such as fruits, meats and the like.

It was also agreed that the average number of cars of plaintiff in error, used in the course of business described within the State of Colorado for the year for which the assessment complained of was made, would equal forty, and that the valuation of \$250 per car was not excessive.

The sole question of law raised was as to the jurisdiction of the State to tax the cars of plaintiff in error so used as agreed, plaintiff in error insist-

ing that the cars having no *situs* within the State their taxation by the State authorities would amount to a regulation of inter-state commerce, and thus be repugnant to the exclusive power vested in Congress to regulate such commerce.

SPECIFICATION OF ERROR.

1. The Supreme Court of Colorado erred in holding that the property in controversy had an actual *situs* within the State of Colorado, and was at the time for which the tax in question was levied within the jurisdiction of the taxing power of that State and taxable under its constitution and laws.

2. Said State court erred in deciding against the claim set up by plaintiff in error that the cars in question were in the State of Colorado only transiently and engaged exclusively in the business of inter-state commerce, and that such taxation was in violation of Art. 1, Sec. 8, of the the Federal Constitution, granting to Congress the power "to regulate commerce * * * among the several States."

3. The said State court erred in giving judgment for the defendant in error, when by the law of the land judgment should have been given for the plaintiff in error.

POINTS.

I.

The cars of plaintiff in error, under the agreed facts, acquired no *situs* in the State of Colorado, for the purposes of taxation.

- Pullman Palace Car Co. v. Pennsylvania, 141 U. S. 18.
Pickard v. Pullman, 117 U. S. 34.
Pullman v. Nolan, 22 Fed. Rep. 276.
Cent. R. R. v. State Board, 49 N. J. L. 11.
Bain v. Railroad, 105 N. C. 363.
Marye v. B. & O. R. R. Co., 127 U. S. 117.
Morgan v. Farham, 16 Wall. 471.
Hayes v. Pac. Mail St. Co., 17 Wall. 596.
St. Louis v. Wiggins Ferry Co., 11 Wall. 423.
Coe v. Errell, 116 U. S. 517.
Crandall v. State of Nevada, 6 Wall. 35.
Robinson v. Longley, 18 Nev. 71.
State *ex rel.* v. State Board (unreported), S. C. Mo., Dec., 1898.

II.

A State cannot tax the vehicles employed exclusively in connection with inter-state commerce where such vehicles have no *situs* within such State.

- Pullman Palace Car Co. v. Pennsylvania, 141 U. S. 18.
Phila. St. Co. v. Pennsylvania, 122 U. S. 346.
Corfield v. Coryell, 4 Wash. C. C. 379.
Erie Ry. Co. v. N. J., 2 Vroom. 531.
Brown v. Maryland, 12 Wheat. 449.
Passenger Cases, 7 How. 458.
State Tax on Railways Gross Receipts, 15 Wall. 292.
Fargo v. Michigan, 121 U. S. 230.
State *ex rel.* v. State Board (unreported), S. C. Mo. Dec. 1898.

ARGUMENT.

The tax in question is a direct property tax. If held valid it must be on the ground that the property taxed had a *situs* within the State of Colorado at the time the tax was assessed.

The railway cars in question in this case were situated with reference to the State of Colorado, as were the cars of the Pullman Co. in the case of Pullman Palace Car Co. v. Pennsylvania, 141 U. S. 18, *with this important exception*, that in that case the cars in question were furnished to railroad companies, under contracts entered into between the car owner and the railroad companies, and "*were continuously and permanently employed in going to and fro upon certain routes of travel.*"

In the case at bar, as shown by the agreed facts (see Rec., p. 11), plaintiff in error "has not, and never has had, any contract of any kind whatsoever by which its cars are leased or allotted to, or by which it agrees to furnish its cars to any railroad company operating within the State of Colorado." "The cars herein referred to are the sole and exclusive property of the plaintiff, and that plaintiff furnishes the same to be run indiscriminately over any lines of railroad over which shippers or said railroads may desire to route them in shipping, and furnishes same for the transportation of perishable freight upon the direct request of the shippers or the railroad companies requesting the same on behalf of shippers." (Rec., p. 11.)

And again in the Pullman case this court found that that company "has at all times substantially the same number of cars within the State, and con-

tinuously and constantly uses there a portion of its property; and it is distinctly found, as a matter of fact, that the company continuously, throughout the periods for which these taxes were levied, carried on business in Pennsylvania, and had about one hundred cars within the State." (141 U. S. p. 26.)

In the case at bar it is agreed that "said cars never were run in said State in fixed numbers, nor at regular times, nor as a regular part of particular trains, nor were any certain cars ever in the State of Colorado, except as engaged in the business aforesaid [*i. e.*, inter-state commerce], and then only transiently present in said State for such purposes." (Rec., p. 15.)

Here we have the distinguishing features between the case at bar and the Pullman case, reported in 141 U. S. They are alike, in that both cases involve a property tax on railway cars used exclusively in inter-state commerce business. They are unlike in that the Pullman cars had a *situs* in Pennsylvania by virtue of contracts which made them a regular part of the equipment of the lines of railway upon which they were continuously run; whilst the cars of plaintiff in error are run indiscriminately at the behest of shippers over any routes selected for their routing, and are never in the State in fixed numbers, but follow the ebb and flow of the currents of commerce.

The cars of plaintiff in error, which were taxed in the State of Colorado, were there under exactly the same circumstances as the cars of any of the foreign railway companies of the United States, which passed into, through and out of the State during

the same period, in the usual course of the interchange of railway cars in through inter-state shipments.

The Supreme Court of Colorado held the tax in question valid seemingly on two grounds: first, that "The effect of our legislation is to give to the cars a *situs* for the purpose of taxation," and second, because: "The *status* of the cars in question was also substantially like that of those under consideration in Pullman Palace Car Co. v. Pennsylvania." (Rec., pp. 23, 24.)

As to the first of these grounds we have only to say that if it be held that the States have power to determine the question of *situs* by legislation, then we throw up our hands. This court has repeatedly decided that the mere fact that property is employed in inter-state commerce, does not exempt it from taxation by the State in which it has an actual *situs*. If the State legislatures have power to decide what shall constitute *situs*, then the power of Congress to regulate inter-state commerce must be given over to the States. We do not think this proposition will be seriously insisted upon by the learned counsel for defendant in error.

The serious question in this case is whether, as the Supreme Court of Colorado concludes, the cars of plaintiff in error, under the agreed facts in this case, acquired a *situs* in the State of Colorado substantially like the Pullman cars in the Pennsylvania case.

The agreed facts state that "the average number of cars of the plaintiff used in the course of the business aforesaid within the State of Colorado, during the year for which such assessment was made, would

equal forty, and that the cash value of plaintiff's cars exceed the sum of \$250 per car, and that if such property of the plaintiff is assessable and taxable within such State of Colorado, then the amount for which such cars, the property of plaintiff in error, is assessed by said State Board of Equalization is just and reasonable, and not in excess of the value placed upon like property within said State for the purposes of taxation."

As clearly appears from the nature of the issues and its position in the agreed statement, this statement in regard to the average number of cars was inserted for the purpose of eliminating from the case any question as to the justness of the amount of the assessment, it being the desire of both parties to obtain a decision as to the power of the State board to assess this property. . It is obvious, however, from the whole statement of facts, that *in the nature* of things there must have been such a thing as *an* average number of cars in the State during a given year, and if it were practicable to obtain for the year a statement from every railroad in the State as to what of plaintiff in error's cars, each day, were in transit through the State, the total divided by 365 would give *some* average. It is not stated that plaintiff in error had an average number of 40 cars within the State of Colorado *throughout* the period in question, but *during* that period. The agreed facts show that the cars were never in the State at any regular times, nor in any fixed numbers * * * "nor were any certain cars ever in the State of Colorado except as engaged in such business aforesaid," *i. e.*, except as requested by shippers, or by railroads on behalf of shippers.

In the Pullman case this court predicated its decision upon the statement that "the company has *at all times* substantially the same number of cars within the State, and continuously and constantly uses there a portion of its property, and it is distinctly found, as a matter of fact, that the company, *continuously throughout* the periods for which these taxes were levied, carried on business in Pennsylvania and had about one hundred cars within the State." (141 U. S. p. 26.)

The Supreme Court of Colorado, in its opinion sustaining the validity of the tax in this case, likens the *status* of plaintiff in error's cars to the cars in question in the Pullman case, "in that there was an average number in use within the State during the period for which the tax was levied," and says, "and we think that under the reasoning of that case they were subject to taxation in this State."

The reasoning by which this court reached its conclusion in the Pullman case is not difficult to state. It is as follows:

1. Property used exclusively in inter-state commerce is not, by reason of this fact alone, exempt from taxation in a State in which it has a *situs*.

2. Property which is kept and habitually used, continuously and permanently, in a State, has a *situs* in the State.

3. The Pullman cars, though used exclusively in inter-state commerce, being continuously and permanently used in the State, along certain definite routes of travel, are taxable, and it is immaterial that occasionally particular cars are removed and replaced by others, the average number being the same throughout the period of taxation.

Or, as summed up by Mr. Justice Bradley in his dissenting opinion in that case: "It seems to me that the real question in the present case is as to the *situs* of the cars in question." (p. 34.) * * * "The opinion of the court is based on the idea that the cars are taxable in Pennsylvania because a certain number *continuously abide* there."

A mere statement of this reasoning shows the glaring *non-sequitur* into which the Supreme Court of Colorado has allowed itself to fall. The agreed facts in this case *distinctly negative* the idea that any fixed or average number of plaintiff in error's cars were continuously, permanently or habitually kept or used in the State of Colorado throughout the period for which the taxes in question were levied. "And said cars never were run in said State in fixed numbers, nor at regular times, nor as a regular part of particular trains, nor were any certain cars ever in the State of Colorado except as engaged by such business aforesaid, and then only transiently present in said State for such purposes." (Rec., p. 15.)

And it was not alone because the Pullman Company used *an average* number of cars in the State of Pennsylvania throughout the year, that the tax was held valid, but because they so used them in a particular manner, to-wit: *habitually* and *continuously* under contract along certain routes within the State.

We think the true rule with respect to the *situs* of rolling stock used on railways in States other than that of the domicile of the owners, is correctly deduced from the adjudicated cases by Messrs. Prentice and Egan in their recent work on "The Commerce Clause of the Federal Constitution," as

contained in the following statement: "Vehicles of transportation by land, *used constantly and continuously upon a single run*, may therefore acquire a *situs* for taxation, independent of the domicile of the owner, and such *situs* is not destroyed by the fact that the owner, having many vehicles of like character, and lines in various parts of the country, from time to time transfers vehicles from one line to another, *provided constant and continuous use is preserved upon a single run.*" (Chicago, 1898, pp. 251, 252.) See also Pullman Palace Car Co. v. Twombly, 29 Fed. Rep. 658.

It must be borne in mind that since the presence and use of the cars of plaintiff in error in the State of Colorado during the period in question, as shown by the agreed facts, is identical with that of the freight cars belonging to all railway companies, other than those operating railroads in the State of Colorado, in the ordinary course of the interchange of cars incident to "through" shipments, to sustain the tax in question in this case is to say that the cars of the Baltimore & Ohio Railroad Co., for example, which in the course of interstate shipments run from New York to California, are taxable in each State through which they pass. The ownership of the cars is, of course, immaterial so far as the question of *situs* is concerned—whether the cars are owned by a fast freight line, as in the case at bar, or a brewery, or a packing house, or a railroad company, the use in a particular State is identical.

SITUS.

The idea of *permanency* is as inseparable from that conveyed by the word *situs*, in connection with propositions regarding taxation, as the idea of anything "temporary" in character is opposed thereto. The commercial traveler who to-day descends on Pittsburg, with his sample trunks, tomorrow on Chicago, the next day on St. Louis, and so on through the different States in the Union until he gets to San Francisco, would be surprised to learn that his trunk had acquired a *situs* for the purposes of taxation in each of the States in which he had stopped in the course of his journey. An attempt to tax a traveling circus, going from State to State, met with a prompt check in *Robinson v. Longley*, 18 Nev. 71. To acquire a *situs* in a State, property must be *located*, *i. e.*, commingled with the general mass of property in the State. Since the foundation of our government it has been held that a mere transient, or property merely in transit, through a State, was not taxable by such State. The original articles of confederation provided that "the people of each State shall have free ingress and egress to and from any other State," and such right is held involved under the present Federal Constitution in the "privileges or immunities" secured to citizens of the United States.

Crandall v. State of Nevada, 6 Wall. 35.

We admit freely the right of a State to tax all subjects "within its jurisdiction," but the question remains: *what is within its jurisdiction?* A reference to a few of the decisions of this court will make this

plain. In *Leloup v. Mobile*, 117 U. S. 640, it is said: "This exemption of inter-state and foreign commerce from State regulation does not prevent the State from taxing the property of those engaged in such commerce, *located within the State*, as the property of other citizens is taxed."

In *Marye v. B. & O. R. R. Co.*, 127 U. S. 117, it is said: "If the Baltimore & Ohio Railroad Company is permitted by the State of Virginia to bring into its territory, and there to *habitually use and employ* a portion of its movable personal property, and the railroad company chooses to do so, it would certainly be competent and legitimate for the State to impose the burden of taxation imposed upon other similar property *used in the like way by its own citizens.*"

In *Pullman Southern Car Co. v. Nolan*, 22 Fed. Rep. 276, Justice Matthews, who wrote the opinion in the case last cited, says, speaking of sleeping cars: "They are not brought into the State for the purpose of being employed in a business carried on within it, and do not become a part of the mass of property within the jurisdiction of the State for the purposes of taxation." (We submit, with all due respect to the court whose opinion is under review, that this definition of *situs* is just as sound as it would have been had it been announced in a case involving a "property" instead of a "privilege" tax.)

And so the various cases cited defining *situs* abound with such expressions as property which "*abides within the State*," or "*forms a part of its personal property*," or becomes "*blended in the business*" in the State, or "*incorporated with the*

other personal property" of the State, or becomes "part of the common mass of property therein." All of these definitions involve the idea of permanency of location. And it was for the reason that the cars involved in the Pullman-Pennsylvania case, and *Marye v. B. & O. R. R. Co.*, were found to have been brought into the States for permanent local use, that they were held to possess an *actual situs* in the States respectively.

The distinction which this court was careful to draw, in deciding the case of *Pullman v. Pennsylvania*, *supra*, between ships on the high seas or water, highways and railroad equipment continuously used along a definite route in a State, gives us perhaps the best definition as to what constitutes *situs* for purposes of taxation, to be found in the books. This court says (p. 23 of 141 U. S.): "Ships or vessels, indeed, engaged in inter-state or foreign commerce upon the high seas, or other waters which are a common highway, and having their home port, at which they are registered under the laws of the United States, at the domicile of their owners in one State, are not subject to taxation in another State at whose ports they incidentally or temporarily touch for the purpose of delivering or receiving passengers or freight. *But that is because they are not, in any proper sense, abiding within its limits, and have no continuous presence or actual situs within its jurisdiction, and, therefore, can be taxed only at their legal situs, their home port and the domicile of their owners.*"

The domicile of plaintiff in error is Illinois; that is the "home port" of its cars; there its entire property is taxable; its cars "incidentally or tem-

porally touch" the State of Colorado in the course of their inter-state journeys; "they are not in any proper sense abiding within its limits, and have no continuous presence or actual *situs* within its jurisdiction," since the agreed facts show that, "plaintiff has not and never has had any contract of any kind by which its cars are leased or allotted to, or by which it agrees to furnish its cars to any railroad company operating within the State of Colorado; that it has and has had during said time no office or place of business, nor other property than its cars within the State of Colorado, and that all the freight transported in plaintiff's cars in or through the State of Colorado, including the cars assessed, was transported in such cars, either from a point or points in a State of the United States outside of the State of Colorado to a point in the State of Colorado, or from a point in the State of Colorado to a point outside of said State, or between points wholly outside of said State of Colorado, and said cars never were run in said State in fixed numbers, or at regular times, nor as a regular part of particular trains, nor were any certain cars ever in the State of Colorado, except as engaged in such business aforesaid, and then only transiently present in said State for such purposes. That owing to the *varying* and *irregular demands* for such cars, the various railroad companies within the State of Colorado have not deemed it a profitable investment to build or own cars of such character, and therefore relied upon securing such cars when needed from the plaintiff or corporations doing a like business."

We are duly impressed with closing paragraph of the opinion of this court on the rehearing of the

case of Adams Express Co. v. Ohio, 166 U. S. 185-225, which is as follows: "In conclusion, let us say that this is eminently a practical age; that courts must recognize things as they are and as possessing a value which is accorded to them in the markets of the world, and that no fine spun theories about *situs* should interfere to enable these large corporations, whose business is carried on through many States, to escape from bearing in each State such burden of taxation as a fair distribution of the actual value of their property among those States require." But we submit that not only do we present here no "fine spun" theory in regard to the *situs* of the property here in question, but have appealed only to the definitions which have again and again been announced and applied by this court, and we respectfully insist that to hold, as the Supreme Court of Colorado has held in this case, that under the agreed facts herein the property in question had an *actual situs* in Colorado, is equivalent to holding that the same tangible property may have an *actual situs* at the same time, in every State in the Union, and thus to *construct* a fine spun theory of *constructive situs* which has as yet never been recognized or suggested by any court in the Union, and "in this eminently practical age" we feel confident never will meet with the sanction of this court.

We are glad to be able to refer the court to the opinion of the Supreme Court of Missouri, which has just been handed down (December 13th, 1898), which declares unconstitutional an act of the Legislature of that State passed in 1895, which was specially framed to accomplish just what was attempted by the State Board of Equalization in this case,

which opinion fully sustains the position which we have taken in this brief. The opinion is as yet unreported (as this goes to press) and we refrain from quotations therefrom.

THE REGULATION OF INTER-STATE COMMERCE.

We understand the well settled law to be that the mere fact that personal property is employed in inter-state commerce, does not prevent its being taxed in a State in which it has a *situs*, like other personal property within its jurisdiction. The fact that the cars of plaintiff in error in this case are used exclusively in inter-state commerce, affords alone a ground of jurisdiction of this court in this case.

In the original complaint, upon which this case was submitted to the District Court of Arapahoe County, the following allegations are made (Rec., p. 2):

"Plaintiff further alleges that the business in which said cars, including the cars hereinafter mentioned, are and were during the said times engaged, and was exclusively inter-state commerce business, being confined to the interchange of perishable products of the various parts of the United States."

"Plaintiff further alleges that the plaintiff has and has had no office or place of business within the State of Colorado, and that all the freight transported in plaintiff's cars in or through the State of Colorado, including the cars hereinafter mentioned, was transported either from a point or points in a State of the United States outside of the State of Colorado to a point within the State of Colorado, or

from a point in the State of Colorado to a point without said State, or between points wholly outside of said State of Colorado; and that said cars are and were in said State of Colorado at no regular intervals nor in any regular number, and when in said State of Colorado are and were only within said State in transit, except to load and unload freight shipped from within and out of the State, or going into the State from without, and then only transiently present for the said purpose."

These facts are all admitted in the agreed statement of facts. (Rec., p. 11.)

The statement of facts as embodied in the bill for injunction in the case of *Fargo v. Michigan*, 121 U. S. 230, so far as relates to the use of complainant's cars, is almost identical with the facts we have here. In that case the tax was upon the gross receipts derived from the use of the freight cars of complainant in the State of Michigan, instead of on the cars themselves, as here. This court likens that case to that of *Pickard v. Pullman Southern Car Co.*, 117 U. S. 34, and says; "In that case, after an exhaustive review of the previous decisions in this class of cases by Mr. Justice Blatchford, who delivered the opinion of the court, it was held that, *as these cars were not property located within the State*, it was a tax for the privilege of carrying passengers in that class of cars through the State, which was inter-state commerce, and for that reason the tax could not be sustained."

Whether a given tax be a direct tax upon property, or an indirect tax falling more remotely thereon, by being based upon its use, the effect so far as the tax constituting a burden is concerned, is

the same. And where the property is used exclusively as an instrumentality of inter-state commerce, the tax becomes a burden on that commerce, whether directed against the property or the uses. As said by this court in *Brown v. Maryland*, 12 Wheat. 449: "All must perceive that the tax on the sale of an article imported only for sale is a tax on the article itself."

And as said by Mr. Justice Grier in the *Passenger Cases*, 7 How. 458: "We have to deal with things, and we cannot change them by changing their names. Can a State levy a duty on vessels engaged in commerce and not owned by her citizens, by changing its name from "a duty on tonnage" to a tax on the master, or an impost on imports by calling it a charge on the owner or supercargo, and justify the evasion of a great principle by producing a dictionary or a *dictum* to prove that a ship captain is not a vessel, nor a supercargo an impost."

If a State is permitted to impose whatever tax it pleases on the cars by means of which inter-state commerce is carried on, of what avail is it that it is not permitted to impose a license tax for the privilege of doing the business, or impose a tax on the gross receipts of the business.

It would seem that it could not even be plausibly contended that had the Michigan statute, which was involved in the case of *Fargo v. Michigan*, *supra*, imposed a direct tax on the average number of complainant's cars used annually in the business described, instead of on the gross receipts arising out of such use, it would have been held that such tax was legal and valid. As was remarked by Justice Miller in *State Tax on Railway Gross Receipts*, 15

Wall. 292: "It seems to me that to hold that a tax on freight is within it (*i. e.*, *the commerce clause of the Constitution*), and that on gross receipts arising from such transportation is not, is "to keep the word of promise to the ear and break it to the hope." Yet the Michigan statute so framed would have given rise to the precise question presented by the case at bar for decision.

The Supreme Court of North Carolina has in the case of *Bain v. Richmond & Danville R. Co.* (105 N. C. 363), so well stated the law with reference to the restrictive effect of our Federal Constitution on the power of States in the taxation of property used in inter-state commerce, that we feel that we cannot do better than to transcribe here what is there said:

"If the State were absolutely sovereign in all respects, it might tax property coming into it temporarily from another State for the purposes of trade, or property passing across its territory from one State to another or other States in the course of trade, travel and commerce. It might tax such trade and travel, in the discretion of its legislature. But as a member and constituent part of the Federal Union, it does not possess unlimited powers of taxation as to all property, matters and things that might otherwise be deemed and made subjects thereof. It and its authorities, including its courts of justice, are bound by that constitution; and it is its and their duty to observe, administer and enforce its provisions in proper cases and connections, as much so as its own constitution and laws. Indeed, the Constitution of the United States is a part of the organic law of this State; and, in principle and theory, there is not, and cannot be, any conflict between the Constitution and Laws of the United States and the same of this State. If conflict, in fact, exists in any respect as, unhappily, is sometimes the case, it is so because those who determine what the law is, administer and enforce it, are ignorant of or misapprehend its true meaning and application, or willfully disregard and disobey it."

"A leading and very important purpose of the Federal Union was to establish and secure the freedom of trade and commerce, both foreign and domestic, and particularly, for the present purpose, between and among the several States comprising it. To this end it is provided, in its Constitution (Art. 1., Sec. 8, par. 3) that 'The Congress shall have power * * * to regulate commerce with foreign nations and among the several States, and with the Indian tribes.' The power thus con-

ferred is indefinite as to its scope and capable of very latitudinous interpretation and exercise, particularly as it is part of the organic law, and the subject to which it relates is one of great breadth and compass. It is difficult to determine its just limit in many respects; but it should receive a reasonable interpretation, such as will effectuate the purpose contemplated, trenching as little as practicable upon the powers, rights and convenience of the States. Very certainly the provision implies that Congress should regulate such commerce, and the States shall not; that Congress shall do so effectually, in such way and by such means as will secure, promote and encourage the same, and that the States shall not, if disposed to do so, interfere with, destroy, hinder or delay the same, or divert it in any way, by any legal constraint, for their own advantage otherwise than to a very limited extent, as allowed by the Constitution. Hence it is settled that a State cannot tax commerce, trade, travel, transportation, or the privilege to carry on and conduct the same, or the vehicles, means and appliances employed and used in connection therewith, coming into that State from another temporarily, however frequently, and returning to such other State; nor can it tax such commerce, or such incidents thereto, passing across it from another or other States to another or other States, however often this may be done. And the reason is that to so tax such commerce, and the incidents thereto, including such means of transportation, would tend directly and have the effect in a greater or less degree and extent, to interfere with the freedom of commerce among and between the people of the States. It would have the certain effect to embarrass, hinder and delay the free course of such trade. If a State could thus tax such commerce at all, it might, in its discretion, for its own benefit and advantage, tax it so heavily as to practically destroy it within its own borders, and in possible cases prevent it from passing freely into other States. Moreover, if one State might tax it, every State through which it passed might do so likewise; and thus the power of Congress to regulate interstate trade and commerce would be nugatory, and a sheer mockery. It is clear that a State has no such power, and the Supreme Court of the United States has authoritatively so decided, directly and in effect, in many cases. *Hay v. Southern Mail SS. Co.*, 17 How. (U. S.) 596; *Morgan v. Parham*, 16 Wall. (U. S.) 471; *Gloucester Ferry Co. v. Pennsylvania*, 114 U. S. 196, 13 Am. & Eng. Corp. Cas. 365, and numerous cases there cited. *Pickard v. Pullman Southern Car Co.*, 117 U. S. 34, 24 Am. & Eng. R. Cas. 511; *Leloup v. Port of Mobile*, 127 U. S. 640, 21 Am. & Eng. Corp. Cas. 26."

The uniform holding of this court is that no State has the right to lay a tax on inter-state commerce in any form; that taxation is a form of regulation; that if such power exist in the State, it is, of course, unlimited, and it is a power which, if exercised,

cannot but embarrass and impede, if it does not destroy, such commerce. The regulation of such commerce belongs solely to Congress; in that matter "the United States are but one country, and must be subject to one system of regulations, and not a multitude of systems." (Robbins v. Shelby Taxing District, *supra*.) And admitting that personal property may have a *situs* other than that of the domicile of its owner, and that the mere fact that it is used in inter-state commerce is not sufficient to exempt it from State taxation, we claim that rolling stock, used exclusively as instrumentalities of inter-state commerce, and not continuously and habitually used in a State, nor confined to definite lines of railroad therein, is exempt from taxation in such State.

All of which is respectfully submitted.

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Attorney for Plaintiff in Error.

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OFFICE SUPREME COURT U. S.
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JAMES H. McKENNEY,

Clerk

No. 226.

By J. Werner & Harmon for P.

Filed Feb. 27, 1899.
IN THE
Supreme Court of the United States.

OCTOBER TERM, 1898.

THE AMERICAN REFRIGER-
ATOR TRANSIT COMPANY,

Plaintiff in Error.

vs.

No. 226.

FRANK HALL, TREASURER OF
ARAPAHOE COUNTY, COLORADO,

Defendant in Error.

IN ERROR TO THE SUPREME COURT OF COLORADO.

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IN ERROR TO THE SUPREME COURT OF COLORADO.

Most of the general propositions of law stated by the learned counsel for the defendant in error, in his brief, we do not dispute. Some of them are too broadly stated, ignoring entirely the question of *situs*. Others are incomplete, because they treat the rule that merely being instruments of commerce does not exempt property from taxation as equivalent to one that such instruments may be taxed by the States, under all circumstances, whenever found therein.

But it is true that this case has to do with the application of well settled principles of law, to

a given state of facts. And it is in the application of these principles to the admitted facts in this case, which the counsel seeks to make, that we find the main source of our difference with him.

The key note of the argument of the counsel for the State of Colorado is struck in his quotation of the second clause of the stipulation of facts, and especially of the words "that the average number of cars of the plaintiff, used in the course of the business aforesaid within the State of Colorado during the year for which assessment was made, would equal forty." This, the learned counsel regards, as a fatal admission, and decisive of the case. He says: "This stipulation has an important bearing in determining the question of *situs* of this particular property when considered in the light of the authorities cited. It, in fact, brings the property directly within the reasoning of the Pullman Palace Car case, *supra*, and other authorities hereafter quoted."

The purpose of this stipulation we explained in our original brief. There is no pretense that any *average* amount of plaintiff in error's equipment was taxed in this case. But we have no desire to avoid the full force of this statement of fact. We regard it as altogether *immaterial* in the determination of the question of *situs* raised by the facts in this case. The learned counsel for the State regards it as *controlling*. The stipulation reads, "that the average number of cars of the plaintiff, *used in the course of the business aforesaid* within the State of Colorado during the year, would equal, etc." We regard the italicized words as the controlling feature of this case. The learned counsel argues that the fact

that there was *an* average number of cars used in the State during the year, irrespective of the character of the use, is sufficient of itself to confer the jurisdiction necessary to sustain the tax.

We feel confident that the authorities, to which we will shortly refer, clearly bear us out in our contention. But before advertng to them we desire to say that had the learned counsel appreciated the distinction, as he claims he cannot, between the word "during," as used in this stipulation, and "throughout," as used by this court in the Pullman case and other cases, perhaps he would not have been led into his, as we regard it, fallacious argument. The facts in the Pullman case did not show that that company had 300 cars in the State on one day, 10 on another, 50 on a third and none on a fourth, and so on, irregularly and intermittently, making an average during the year of 100, but, as said by the court (141, U. S. p. 26): "The route over which the cars travel extending beyond the limits of the State, particular cars may not remain within the State; but the company has *at all times* substantially the *same number* of cars within the State, and *continuously* and constantly uses there a portion of its property; and it is distinctly found, as matter of fact, that the company *continuously, throughout* the periods for which these taxes were levied, *carried on business in Pennsylvania* and had about one hundred cars within the State." From the beginning to the end of the opinion of the court in this often-quoted Pullman case, the word "average" is not once used. In the case at bar it is distinctly admitted that the cars of plaintiff in error "*never were run in said State in fixed numbers nor at regular times,*" and

were only in the State in transit on voyages of interstate commerce, according as they were needed and routed by shippers in the "*varying and irregular demands*" for such cars in the business in which they were used. It is this difference between the facts in the case at bar and the facts in the Pullman case which the learned counsel fails to see, or, seeing, refuses to attach any importance thereto.

But, if we admit, for the mere purpose of argument, that there were *some* of plaintiff in error's cars somewhere within the limits of the State of Colorado *throughout* the year in question—but in transit, in use in the way described in the agreed facts, how does that alter the case?

To maintain his case counsel is bound to establish the proposition that mere occasional, irregular presence in a State, in transit only, of instruments of commerce among the States, whose owner is domiciled elsewhere and has no office and no contract or arrangement for regular or continuous business in or through such State, subject those instruments to taxation by that State; and that, if the decisions holding that constancy, permanency and regularity of quantity used in the State throughout the taxing period mean anything at all, they may be met by figuring an average, which can of course always be done if property pass through the State but twice, and then holding the amount so found to have been actually in the State all the time.

That this process would subject the contents of cars to like taxation as well as the cars themselves, is obvious. Its results would be appalling. Such rule has no foundation in principle and no shadow of support except, perhaps, in passing remarks in

one or two opinions which were not meant to have any such scope by the judges who made them. Surely if mere actual presence in a State, in transit, gives it the right to tax, then this court has wasted a vast amount of time and reasoning about circumstances and conditions which were wholly immaterial.

In the case of *Standard Oil Co. v. Bachelor*, Treasurer, 89 Ind. 1, the Standard Oil Company had for a length of time been purchasing staves and piling them near a railroad track at one of the railway stations, and shipping, from time to time, from the accumulation on hand. The pile of staves stood in the assessor's district for over a year. Of necessity an *average* amount was on hand during the whole of this period. The local assessor undertook to list and assess the staves so piled up, and a tax was levied on the assessment, the collection of which was successfully enjoined. The Supreme Court of Indiana held that the staves were *in transitu*, and says: "Recognizing the rule as above stated by Burroughs, and as deducible from it, it must be held that personal property found in transit through, or temporarily within a State, other than the one in which the owner resides, cannot be taxed in the State in which it is so found, on the principle that for the purpose of taxation it belongs to the State in which the owner has his residence."

So, in *State v. Engle*, 34 N. J. L. 425, the course of business was to ship coal, mined in Pennsylvania, to Elizabethport in New Jersey, where it was deposited and separated according to its different sizes, and, when a cargo of one size was obtained, it was shipped to market. Some *average* amount

was always lying on the wharf awaiting shipment, but this fact did not prevent the application of the rule forbidding the taxation of goods in transit. And while in that case it does not appear that the assessor tried to ascertain this *average*, the court says, very significantly, as it appears to us: "If a tax may be laid on the quantity lying on the wharf when the assessment is made, why not tax every ton that is sent across the State throughout the year? If it may be laid on any property that is within the State at the time the assessment is usually made, it may be laid on all property that is brought within the State at all times of the year. A change in the tax law, as to the mode and time of assessment, is all that would be necessary to accomplish that purpose."

And, in the later case of *State v. Carrigan* (39 N. J. L. 35), the same court applied the same rule to a similar state of facts, in which it clearly *did appear* that the *average* amount had been assessed. In this latter case the coal was shipped from Pennsylvania to tide-water at Port Johnson, N. J., where it was deposited in the dock for reshipment. Quoting from the opinion (p. 36): "The quantity of coal delivered in this way, in the course of a year, amounts to about one million five hundred thousand tons. The assessment complained of was on a valuation of \$50,000, on which a tax of \$1,100 was laid. The assessor testified that he made the assessment on the coal on the docks—lying on the docks and in the bins on the dock—that he estimated the quantity of coal at that time at fifty thousand tons, and took an estimate *from an average* of from ten thousand to twelve thousand tons *throughout* the year, and

obtained his valuation for taxation on that basis." The court then proceeded to declare the tax void, as being laid upon property in the course of transit across the State, holding that it had no *situs* within the State for the purpose of taxation.

In the case of *State ex rel. Armour Packing Co. v. Stephens, Governor, et al.*, recently decided by the Supreme Court of the State of Missouri, to which reference was made in our original brief, the opinion in which has since that brief was printed been published (see 48 S. W. Rep. 929), under the provisions of a law enacted by the Missouri Legislature in 1895, entitled "An act to provide for the assessment and taxation of railway cars other than those which are the property of railroad companies," an elaborate method was provided for the very purpose of ascertaining the *average number* of cars of each company, other than railway companies, whose cars passed into or through the State in each year. This was ascertained from the total aggregate number of miles traveled by the cars of each owner in the State during the year, and the daily average travel of such cars, and thence the number of cars required to make such aggregate mileage in one year. No method was provided to distinguish between mileage made by cars engaged in interstate commerce and cars engaged in purely local travel in the State. The proceeding was by *certiorari*, and the judges differed as to whether the jurisdiction of the State Board to assess should affirmatively appear on the face of the record; otherwise all seem to concur in the main opinion delivered by Marshall, J. In that case, which embraced the taxes levied for the years 1895 and 1896, the Armour Packing Com-

pany were assessed for 273 cars as the *average* number of its cars within the State for the year 1895, and for 216 cars as the *average* number within the State for the year 1896, such *averages* being ascertained in the manner above mentioned. Judge Marshall in the course of his opinion says (p. 934): "The relator is a corporation organized under the laws of the State of New Jersey, and is engaged at Kansas City, Mo., in the general packing business; that is, in killing and dressing food animals, and in selling the meats thereof. It owns a number of refrigerator cars in which it ships its goods to various counties in this State, and to other States in the Union. Its cars are hauled by various railroads."

"It appears from the petition that the relator's place of business is in Kansas City, in the State of Kansas, and that the cars here taxed are attached to its business, as an incident thereto, and are loaded in the State of Kansas, and shipped into and through the State of Missouri. These allegations are not denied by the return, and hence they must be taken as true in this case."

"Under the circumstances the relator, though a foreign corporation as to the State of Kansas, has acquired a domicile in that State and the cars can only be taxed in that State. *Comstock v. Grand Rapids, Mich.*, 20 N. W. Rep. 624; *City of Du-buque v. Ills. Central R. R. Co.*, 39 Iowa, 83; *British Commercial Life Ins. Co. v. Commissioners of Taxes*, 31 N. Y. 32; *Fargo v. State of Michigan*, 121 U. S. 230; *Pallman's Palace Car Co. v. Pennsylvania*, 141 U. S. 18; *Railway v. Backus*, 154 U. S. 439; *Cable Co. v. Adams*, 155 U. S. 688; *Adams Express Co. v. Kentucky*, 166 U. S. 171; *Hall v.*

Transit Co., 51 Pac. Rep. 421; Weltz Assessm. §§ 49-51. *The reason of the rule is that the cars could not be reached for assessment and taxation any where else, and the company owes this just return to the State of Kansas for the protection it receives from it. The cars are in the State of Missouri only in transsitu, and have no situs in the State. Hence they are not subject to assessment or taxation in this State. Fargo v. Michigan, 121 U. S. 230; California v. Northern Railway Co., 127 U. S. 1; Reading R. Co. v. Pennsylvania, 15 Wall. 232; People v. Wemple, 138 N. Y. 1; 2 Dill Mun. Corp., §§ 787, 738. Being in Missouri only in transit, for the purpose of bringing merchandise from another State into or through this State, they are instruments of interstate commerce, and this State cannot impose any tax upon them. Telegraph Co. v. Texas, 105 U. S. 460; Leloup v. Port of Mobile, 127 U. S. 640; Picard v. Car Co., 117 U. S. 34, Gloucester Ferry Co. v. Pennsylvania, 114 U. S. 196; Reading R. Co. v. Pennsylvania, 15 Wall. 232; Pullman Palace Car Co. v. Pennsylvania, 141 U. S. 18; Express Co. v. Seibert, 142 U. S. 339."*

"Being instruments of interstate commerce, Congress alone has jurisdiction over them, under section 8, Art. I, Const. U. S., except, as above indicated, the cars can be taxed as property by the State in which the company has acquired a domicile and the cars have a *situs*."

If the cars in question here had, under the agreed facts, a *situs* in the State of Colorado, such as had the Armour cars in the above case in the State of Kansas, we freely admit that the tax here in question would be valid. If, however, their use in the State of Colorado was the same as was the use

of the Armour cars, in the above case, in the State of Missouri, to-wit, *in transit* as instrumentalities of interstate commerce, which it is agreed was the case, then this tax is illegal and void under the above decision.

The fallacy of the contention of the learned counsel for the State of Colorado appears to us to be this, that he regards the fact of there having been an *average* number of cars in the State for a given year, sufficient *of itself* to determine the question of *situs*, and this is clearly not so. The only real significance attaching to the *average* amount of goods or number of cars, or what not, which may be subject of taxation, is as determining what should fairly be the *amount* of the assessment. The *jurisdiction to tax* must lie further back, to-wit: in the purpose for which the property was brought into the State, whether for permanent local use, for sale in the markets of the State or otherwise.

Counsel complain that no showing is made that plaintiff in error pays taxes upon the cars here in question in the State of its domicile, the State of Illinois. Under the laws of Illinois, corporations like defendant in error are taxed on their entire possessions, based on the actual value of their capital stock, which is ascertained by the State Board of Equalization. (Chap. 120, Sec. 32 *et seq.*; Sec. 108, Rev. Stat. Ill. 1893). "Listing Capital Stock of Corporations and Franchises of Persons. § 32. Bridges, Express, etc., etc., and all other corporations and associations incorporated under the laws of this State, other than banks organized under any special or general law of the State, and the corporations required to be assessed by the local as-

assessors as hereinafter provided, shall, in addition to the other property required by this act to be listed, make out and deliver to the assessors, a sworn statement of the amount of the capital stock, setting forth particularly:”—name and location, number of shares, market or actual value of shares, amount of indebtedness, assessed valuation of tangible property. § 33. (Provides for transmission to State Board of Equalization.) § 108. “The State Board of Equalization shall assess the capital stock of each company or corporation, respectively, now or hereafter incorporated under the laws of this State, in the manner hereinbefore in this act provided. The respective assessments so made (other than of the capital stock of railroad and telegraph companies) shall be certified by the auditor, under direction of said board, to the county clerk of the respective counties in which such companies or associations are located, and said clerk shall extend the taxes for all purposes on the respective amounts so certified the same as may be levied on the other property in such towns, districts, villages or cities in which such companies or associations are located.” The presumption is, of course, that plaintiff in error complied with the laws of its domicile. Even if it had not it would be liable therefor. But that fact is utterly immaterial here. As said by the court in *Coe v. Errol* (116 U. S. 517-524): “If the owner of personal property within a State resides in another State which taxes him for that property as a part of his general estate attached to his person, this action of the latter State does not in the least affect the right of the State in which the property is situated to tax it also. It is hardly necessary to cite author-

ities on a point so elementary." The same point was made in *Morgan v. Parham*, 16 Wall. 471, and the court said (p. 478): "Whether the steamer *Frances* was actually taxed in New York during the years 1866 and 1867 is not shown by the case. It is not important. She was liable to taxation there. That State alone had dominion over her for that purpose. Alabama had no more power to tax her or her owner than had Louisiana, or than Florida, Georgia and South Carolina would have had in the case I have supposed."

We respectfully submit that the tax in question, under the agreed facts, is illegal and void under Sec. 8 of Art. I, of the Federal Constitution, and that the judgment of the Supreme Court of Colorado should be reversed.

All of which is respectfully submitted,

PERCY WERNER,

Attorney for Plaintiff in Error.

JUDSON HARMON,

Of Counsel.

No. 226

UNITED STATES SUPREME COURT
FILED

FEB 21 1899

JAMES B. MCKINLEY,

Clerk

Brief of M. McKinley for R. C.

THE SUPREME COURT

Filed Feb 21, 1899

UNITED STATES.

OCTOBER TERM, 1898.

THE AMERICAN REFRIGERA-
TOR TRANSIT COMPANY,

Plaintiff in Error,

vs.

FRANK HALL, TREASURER OF
ARAPAHOE COUNTY, COLO-
RADO.

Defendant in Error.

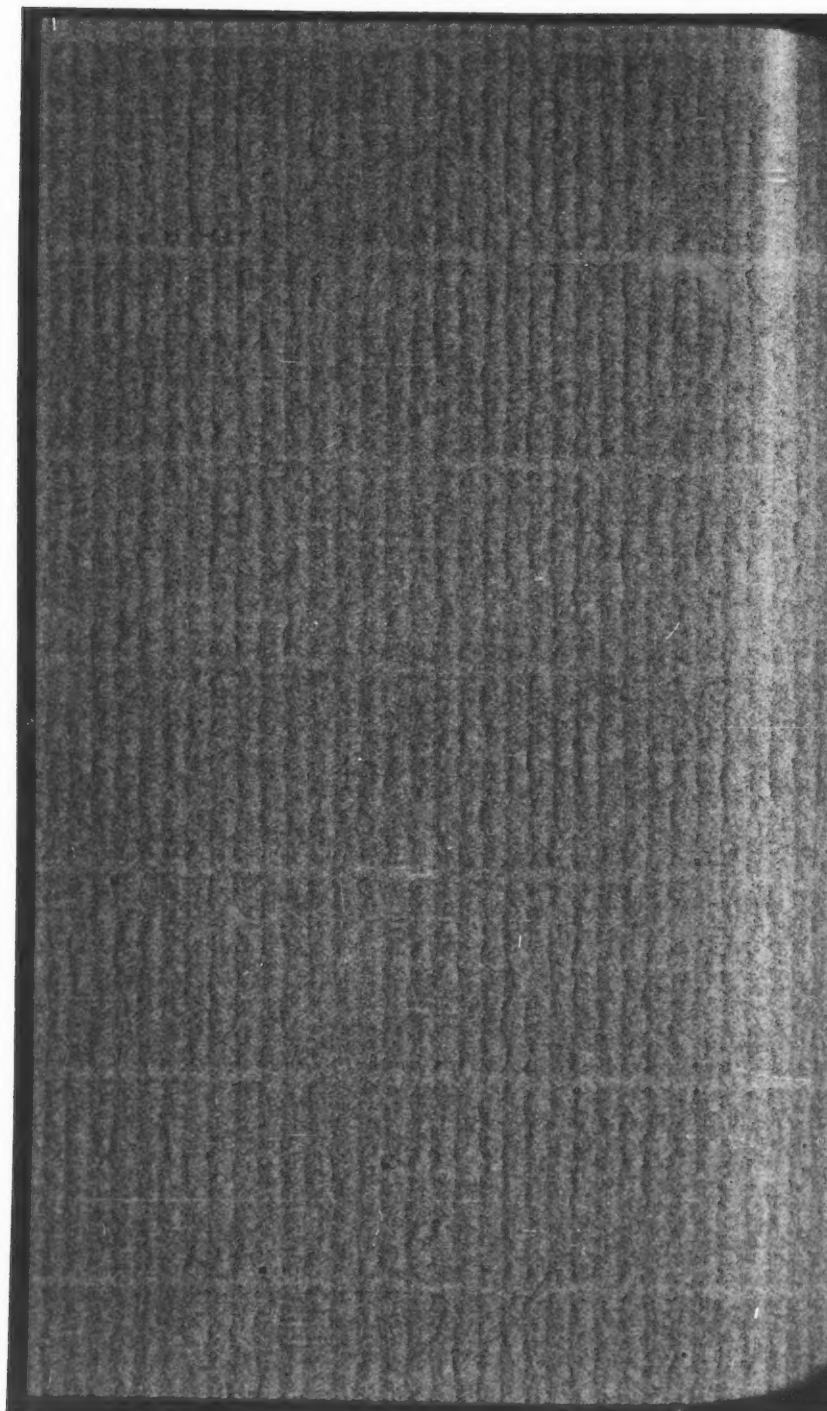
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*In Error to the Su-
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STATEMENT AND BRIEF FOR DEFENDANT
IN ERROR.

ALEXANDER B. MCKINLEY,

Attorney for Defendant in Error.



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STATEMENT.

In the Supreme Court of the State of Colorado, on the hearing of this case, three questions of law were involved:—

First.—Whether the cars of the Transit Company, being only transiently present within the State of Colorado from time to time, acquired no such

situs within said state, as is necessary to give the state jurisdiction over them for the purposes of taxation.

Second.—Whether such taxation amounts to a regulation of interstate commerce, and thereby is repugnant to the exclusive power of Congress to regulate such commerce.

Third.—If said property is taxable within this state, whether there is adequate state legislation to assess and tax the same.

Each of these questions was fully considered by the Supreme Court of Colorado, and each decided in favor of this defendant in error.

As to the third question, the State Supreme Court having passed upon the validity and sufficiency of the local statutes, this Court will follow its decision in that respect, thereby eliminating that question and leaving the other two questions to be considered in this Court.

Counsel for plaintiff in error, in their specifications of error, on page 4 of their brief, practically recognize these two questions as the only ones before this Court. They also recognize, as we do, that these two points of *situs* and of the interstate commerce matter, are somewhat mingled and involved one with the other; the language of their brief (p. 3) being as follows:

“The sole question of law raised was as to the jurisdiction of the state to tax the cars of plaintiff in error so used as agreed, plaintiff in error insisting that the cars having no *situs* within the state, their taxation by the state authorities would amount to a regulation of in-

terstate commerce, and thus be repugnant to the exclusive power vested in Congress to regulate such commerce."

POINTS.

1. The tax now under consideration is not a license tax, or in any sense a tax for the privilege of transacting interstate commerce, but only a property tax imposed upon certain cars employed in such commerce.

Adams Express Co. vs. Ohio (rehearing),
166 U. S., 185.

Ibid (original), 165 U. S., 194.

Adams Express Co. vs. Ind., 165 U. S., 255.

Postal Telegraph Cable Co. vs. Adams, 155
U. S., 688.

Adams Express Co. vs. Ky., 166 U. S., 171.

Pullman Palace Car Co. vs. Pa., 141 U. S., 18.

Marye vs. B. & O. Ry. Co., 127 U. S., 117.

Also, authorities cited in foregoing cases.

2. The fact that cars or other vehicles are employed in interstate commerce does not in the least abridge the right of a state to tax them; their being so employed does not exempt them from taxation by the state, and the state does not tax them because of their being so employed, but because of their being within its territory and jurisdiction.

Adams Express Co. vs. Ohio, rehearing,
166 U. S., 185; s. c. (original) 165 U. S.,
194.

Pullman Palace Car Co. vs. Pa., 141 U. S.,
18.

3. The fact that the same cars are not continuously in use in Colorado, but are changing, does not prevent assessment and taxation. In such case the tax may be fixed by a valuation of the average amount of the property thus habitually used in the state.

Pullman Palace Car Co. vs. Pa., *supra*.
Marye vs. B. & O. R'y., *supra*.

4. The right of the state to tax all subjects within its jurisdiction is unquestionable, and this right may in the discretion of the Legislature be exercised over all property coming temporarily within its territory, whether for trade, business or convenience, unless such exercise conflicts with some constitutional limitation.

Pullman Palace Car Co., *supra*.
R. R. Co. vs. Penniston, 18 Wall., 5.
Lane vs. Oregon, 7 Wall., 71.
25 Am. & Eng. Ency. Law, p. 18.

5. For the purposes of taxation, personal property may be separated from its owner, and he may be taxed on its account at the place where it is, although not the place of his domicil, and even if he is not a citizen or resident of the state which imposes the tax.

Pullman Palace Car Co. vs. Pa., *supra*, and authorities therein cited.

6. The courts of the United States adopt and follow the decisions of the highest court of a state in questions which concern merely the constitution or laws of that state.

Bucher vs. Cheshire R. R. Co., 125 U. S., 555.

Long Island Water Supply Co. vs. Brooklyn, 166 U. S., 685.

M. & M. Bank vs. Pa., 167 U. S., 461.

Adams Express Co. vs. Ohio, 165 U. S., on page 219.

ARGUMENT.

In this case, in lieu of evidence, there was an agreed statement of facts, which is set out in full in the printed transcript of record in this Court, on pages 10, 11 and 12; again on pages 14, 15 and 16; and again on pages 20 and 21.

The second clause of that stipulation is as follows:

"2nd. That the average number of cars of the plaintiff used in the course of the business aforesaid within the State of Colorado during the year, for which such assessment was made, would equal forty, and that the cash value of plaintiff's cars exceeds the sum of \$250 per car, and that if such property of the plaintiff is assessable and taxable within such State of Colorado, then the amount for which such cars, the property of the plaintiff, is assessed by said State Board of Equalization, is just and reasonable and not in excess of the value placed upon other like property within said state for the purpose of taxation."

This stipulation has an important bearing in determining the question of *situs* of this particular property when considered in the light of the authorities cited. It, in fact, brings the property directly within the reasoning of the Pullman Palace Car case *supra*, and other authorities hereafter quoted.



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This was the view taken by the Supreme Court of Colorado.

See—

Opinion Supreme Court in this case, set out in full, pp. 22-26, inclusive, of the printed transcript of record herein.

The fact is admitted in the stipulation taken in connection with the pleadings, that the cars of the plaintiff in error were used on the railroad lines in the State of Colorado, and to the extent of such use took the place of other equipment of such railroads that would have been necessary for a particular class of freight, to-wit, perishable goods.

If it had been left to proof under the pleadings as to the use of such cars, it could have been made to appear that certain cars traveled exact distances on certain days throughout the tax year. The records of plaintiff in error and of railroad companies would necessarily show this, as it appears by the pleadings that these Colorado railroads pay the plaintiff in error for the exact number of miles hauled, three-fourths of a cent a mile. Aggregating the total mileage and the total number of days in a year, it would have been susceptible of proof as to the average number of cars in use throughout the year. For this proof was substituted the stipulation that the average number of cars so used within the State of Colorado "during the year for which assessment was made, would equal forty."

I can see no force in the learned counsels' distinction between the use of the word "during" used in the stipulation, and the word "throughout"

used in some of the decisions. For, taken in connection with the pleadings, the stipulation can mean nothing else than that to transact the business which plaintiff in error is transacting in Colorado, it requires the use of forty of its cars, not for one day nor for ten days, but on an average for each day during and throughout the whole tax year. The cars may at times be on side tracks, or elsewhere, but considering all the business of the plaintiff in error done within the boundaries of Colorado for the given year, it would have required, or did require, the entire use of forty cars. It is, of course, admitted under the decisions, that the presence of any one car, throughout the entire year, is immaterial, if there was habitually the average number in use.

It being ascertained that that number of cars was within the State of Colorado during the tax year, the assessment and taxation of them by the state authorities was only the attempt to subject property within the state to taxation the same as property always and wholly within the state. It was no attempt to regulate or attach a condition by way of license or assessment on the the privilege or permission to plaintiff in error to transact business, or to carry on commerce. That privilege or right was wholly unaffected. It would seem, at least, that to sustain even a shadow of complaint on this ground, the plaintiff in error should have attempted to show that these cars were its property in another state, and were there assessed and taxed. Plaintiff in error has made no showing of this kind.

On this head, I quote from the argument of

Mr. Twitchell for the Treasurer in the Supreme Court of Colorado:

"There is a difference between the cars of this character, and those furnished by another railroad. In the case of cars owned by another railroad company, such companies are required to return and list the same for taxation as a part of the rolling stock of their own road, in whatsoever state they may be operating, and all such rolling stock is taxed, either in this or some other state, and the railroad corporations of this state, using the cars of another railroad company, are simply so using them in place of cars of their own, that are being run over some other railroad. The railroad companies operating in this state return their rolling stock here for taxation, whether it is actually in the state or not; and so it is with railroads operating in other states—they return their rolling stock for taxation there, notwithstanding the fact that some of the Colorado corporations may, upon the particular day fixed for assessments, be using a portion of their rolling stock. In this way all such property contributes a just share of taxes.

"With a company like the plaintiff, however, it is entirely different. It is an Illinois corporation, having its principal office in that state. It is only required, under the laws of Illinois, to return for taxation, such property as it has within that state upon the 1st day of May. If, therefore, its cars are not taxable in the other states where it is doing business, and has its property upon the date of taxation, then the result is that it escapes taxation. If such doctrine is to be upheld, then the different railroad companies will finally organize sub-companies to own their rolling stock, and in that way largely avoid taxation upon their property.

"It is true that nothing is said in the complaint, or statement of facts, as to whether this

property is or is not taxed in the State of Illinois. But if it is taxed, it is incumbent upon the plaintiff to plead and prove such facts, and plaintiff not having done so, we must necessarily presume that it is not taxed in that state."

And in this connection, the language of this Court on the rehearing of *Adams Express Company vs. Ohio*, 166 U. S., 225, is apropos:

"In conclusion let us say that this is eminently a practical age; that courts must recognize things as they are, and as possessing a value which is accorded to them in the markets of the world, and that no fine spun theories about *situs* should interfere to enable these large corporations, whose business is carried on through many States, to escape from bearing in each state such burden of taxation as a fair distribution of the actual value of their property among those states requires."

Property of the plaintiff in error, of a large value, as admitted in the stipulation, is within the State of Colorado. Although the particular cars change, the average total number is here during the year. It is, so to speak, to that extent segregated from like property of the company in other states. To that extent, at least, it receives the benefit and protection of the laws of Colorado, its officers and courts, and its owners should, though domiciled elsewhere, pay a just proportion of the taxes required to maintain the government of the state where that part of its property is so located and protected.

It is evident that the constitution of the state contemplated such taxation:

"All corporations in this state, or doing busi-

ness therein, shall be subject to taxation for state, county, school, municipal, and other purposes, on the real and personal property *owned or used by them* within the territorial limits of the authority levying the tax."

Sec. 10, Art. 10, Colorado Constitution.

Under somewhat similar provisions of the constitution of Utah, the Supreme Court of that state recently discussed the subject of taxation, and, among other things, said:

"Courts, whose decisions are entitled to great weight, have sustained the apportionment of property used by railroad, telegraph, and sleeping-car companies, in different states, or lesser taxing jurisdiction, on the mileage basis. In view of all the difficulties, conditions and elements taken into consideration in those cases, such a basis is accepted as just and practical for ascertaining the property used, or the business carried on and taxed for the benefit of each state, or other jurisdiction."

Again:

"The use meant is not a temporary use of personal property in such county when its owner resides elsewhere. It means the continuous use of its property by a corporation, or other person, in the county, or other taxing district."

Salt Lake County vs. State Board of Equalization (Dec. 3, 1898), Vol. 55, No. 5, dated Jan. 12, 1899, p. 378, Pac. Rep.

The basis of valuation in this case is not even dependent on apportionment, but considers alone the average number of cars, and the admitted value thereof, within the State of Colorado during the tax year in question.

In the original opinion of this Court, in *Adams Express Company vs. Ohio*, 165 U. S., on page 225 (s. c., *Sanford vs. Poe*, 17 Sup. Ct. Rep., 305), this Court quotes with approval the following language of the Court of Appeals in the same case:

"Similar views were expressed by the Circuit Court of Appeals, *Sanford vs. Poe*, 37 U. S. App., 378, 395. Judge Lurton delivering the opinion, saying:

"The tax imposed is not a license tax, nor a tax on the business or occupation, nor on the transportation of property through the state, nor from points within the state to points in other states, nor from points in other states to points within the state. It purports to provide for a tax upon property within the state of Ohio. Though this property is employed very largely in the business of interstate commerce, yet that does not exempt it from the same liability to taxation as all other property within the jurisdiction of Ohio. This proposition is too well settled to need argument.'"

In the same case, on page 220, this Court uses this language:

"Although the transportation of the subjects of interstate commerce, or the receipts received therefrom, or the occupation or business of carrying it on, cannot be directly subjected to state taxation, yet property belonging to corporations or companies engaged in such commerce may be; and whatever the particular form of the exaction, if it is essentially only property taxation, it will not be considered as falling within the inhibition of the Constitution. Corporations and companies engaged in interstate commerce should bear their proper proportion of the burdens of the governments under whose protection they conduct their operations, and taxation on property, collectable by the ordinary means, does not affect

interstate commerce otherwise than incidentally, as all business is affected by the necessity of contributing to the support of government. *Postal Telegraph Cable Co. vs. Adams*, 155 U. S., 688."

And on page 227, this language is used:

"In *Pullman's Palace Car Co. vs. Pennsylvania*, the rule is considered that personal property may be separated from its owner and he may be taxed, on its account, at the place where it is, although not the place of his own domicile, and even if he is not a citizen or resident of the state which imposes the tax; and the distinction between ships and vessels and other personal property is pointed out. The authorities are largely examined and need not be gone over again."

Even the dissenting opinion of this Court in this case argues in favor of our contention herein. The reasons for the dissent in that case were based on entirely different grounds than any which will support the contention of the plaintiff in error in this case. Without elaborating on this point, I quote from the dissenting opinion of Mr. Justice White, first on page 247. After remarking on the review of certain cases in *Postal Telegraph Cable Company vs. Adams*, 155 U. S., 688, Mr. Justice White says:

"And summing the whole up, the Court concluded (p. 700):

"We are of opinion that it was within the power of the state to levy a charge upon this company in the form of a franchise tax, but arrived at with reference to the value of its property within the state and in lieu of all other taxes, and that the exercise of that power by this statute, as expounded by the highest judicial tribunal of the state in the language

we have quoted, did not amount to a regulation of interstate commerce or put an unconstitutional restraint thereon.'

"This construction of the previous cases decided by this Court elucidates and makes plain the fact that they proceeded upon and were intended to enforce the rule that the validity of a state tax would be determined by the substantial results of the burden imposed, and not by the mere form which it assumed, and although the form of the imposition might seem to bring the tax within the reach of the inhibition against levying a charge upon property beyond the jurisdiction of the state, or within the prohibitions of the constitution of the United States forbidding the laying of burdens on interstate commerce, this Court would not interfere therewith provided the exaction in substance amounted to no more than the sum of the taxation which the state might lawfully impose upon the property actually within its jurisdiction, and provided that in reality the burden laid by the state was not an interference with interstate commerce."

And again, on page 249, Mr. Justice White says:

"Before proceeding to discuss this proposition, however, I call attention to the fact that I intentionally refrain from placing a sleeping-car company in the same category with telegraph and railroad companies, because the decision in the case of *The Pullman's Car Co. vs. Pennsylvania*, 141 U. S., 18, was not founded upon the theory, nor did it purport to assert, that the property or plant of a sleeping-car company was a unit, and that of necessity a part of such property may be measured by a rule applicable to continuous lines of road. In that decision the Court merely emphasized the holding that the tax was one laid upon 100 cars of the company, possessing an actual *situs* in Pennsylvania. In the statement of the case

(p. 20), the decision of the Supreme Court of Pennsylvania was quoted verbatim, in which it was declared that the tax on the capital stock of the Pullman Company was in reality but a tax on its property; that the coaches of the company were such property, and that the fact that the coaches might also be operated in other states would simply reduce the value of the property in Pennsylvania justly subject to taxation there. This Court practically adopted the views so expressed by the state Court."

In the case of *Adams Express Company vs. Kentucky*, 166 U. S., p. 171, this Court reviewed a state tax on intangible property, which tax was claimed to be in contravention of the commerce clause. The Court sustained the tax, and among other things said, p. 180:

"So far as the commerce clause and the fourteenth amendment of the federal constitution are concerned, this scheme of taxation is not in contravention thereof, as already determined in *Adams Express Company vs. Ohio State Auditor*, 165 U. S., 194, and cases cited.

"And considered as a property tax, as in our opinion the prescribed exaction must be held to be, we regard it as in harmony with the provisions of the constitution of the commonwealth of Kentucky."

On rehearing of the case of *Adams Express Company vs. Ohio*, 166 U. S., p. 185, much is said both in the opinion of the Court, and even in the briefs and argument of the eminent counsel for the defeated parties, which recognizes the validity of the tax in the case at bar, and refutes the argument and points of the learned counsel in this case. In fact, this and the other opinions of this court, in this and other late cases quoted, seem clearly to

meet all the contentions of plaintiff in error, and to fully and completely overthrow them.

In their petition for re-argument, counsel for the express company say (p. 202):

"16. The sleeping car case stands upon necessity, but of a very different sort from that of the railroad and telegraph cases. The difficulty was occasioned by the circumstance that the cars were constantly moving from state to state; they had a physical *situs* in one as much as in another; but the whole could not be said to have a *situs* in any one. Some method of ascertaining the number and value of the cars in Pennsylvania was necessary. The method adopted was assailed on the ground that capital stock was not taxable. This objection was not good, for capital stock was held not to be taxed, but the cars only. If the method had been attacked on the true grounds it would have been perceived that there was a better way. The method adopted was thought to be effectual to determine the average number and value of cars used in Pennsylvania, and this seems not to have been contested by the Pullman Company. The better way would have been that suggested by Mr. Justice Matthews in *Marye vs. Baltimore & Ohio Railroad*, 127 U. S., 117, 123, cited and approved by the court in the *Pullman cases*, to-wit, to ascertain and appraise the average number of cars habitually used in the state."

On pages 212 and 213, reviewing *The Pullman Palace Car Company vs. Pennsylvania*, 141 U. S., counsel say:

"Upon perusing the opinion in that case, it will be perceived that it begins by an emphatic statement and maintenance of the rule that property is not subject to taxation by a state unless it has an actual *situs* therein. It was

manifest that the sleeping cars had an actual *situs* outside of the place of domicile of the company owning them, and therefore that they were justly taxable outside of that state. The puzzle was that they had this actual *situs* as much in one of several other states as another. Each might put in a claim that a *situs* was within its own territory exclusively. Such exceptional cases of course justify a resort to exceptional methods. The real problem was to ascertain how much of this sleeping car property was fairly to be treated as having a *situs* in Pennsylvania. The actual method which was sanctioned was not subjected to discussion. What was insisted upon by the company was that *no* method was allowable. If the horses, wagons, etc., used by the express companies in Ohio had been, in point of fact, used in a similar manner in half a dozen different states, the decision in the sleeping car case would have justified the adoption of some equitable method of ascertaining to how many of them a *situs* in Ohio should be assigned. Upon the other point, as to whether taxing these sleeping cars was imposing a burden upon interstate commerce, there is nothing certainly opposed to our contention. We have never asserted, in the remotest degree, that the horses, wagons, harness, etc., of the express companies in Ohio are in any way relieved from taxation because employed in interstate commerce."

The Court itself says (p. 218):

"Again and again has this Court affirmed the proposition that no state can interfere with interstate commerce through the imposition of a tax, by whatever name called, which is in effect a tax for the privilege of transacting such commerce. And it has often affirmed that such restriction upon the power of a state to interfere with interstate commerce, does not in the least degree, abridge the right of a state to tax, at their full value.

all the instrumentalities used for such commerce."

The cases of *Pullman Palace Car Co. vs. Pennsylvania*, 141 U. S., and *Marye vs. B. & O. Ry. Co.*, 127 U. S., more especially applied to the subject of taxation of tangible property such as in this case, and are particularly in point. The doctrines announced are followed, emphasized and elaborated in the later Express Company cases, but, owing to the subject matter of the taxation being so like that involved in this suit, I quote from these earlier cases also.

In the Pullman Palace Car case, on pages 25 and 26, it is said:

"The cars of this company within the State of Pennsylvania are employed in interstate commerce; but their being so employed does not exempt them from taxation by the state; and the state has not taxed them because of their being so employed, but because of their being within its territory and jurisdiction. The cars were continuously and permanently employed in going to and fro upon certain routes of travel. If they had never passed beyond the limits of Pennsylvania, it could not be doubted that the state could tax them, like other property within its borders, notwithstanding they were employed in interstate commerce. The fact that, instead of stopping at the state boundary, they cross that boundary in going out and coming back, cannot affect the power of the state to levy a tax upon them. The state, having the right, for the purposes of taxation, to tax any personal property found within its jurisdiction, without regard to the place of the owner's domicile, could tax the specific cars which at a given moment were within its borders. The route over which the cars travel extending beyond the limits of the

state, particular cars may not remain within the state; but the company has at all times substantially the same number of cars within the state, and continuously and constantly uses there a portion of its property; and it is distinctly found, as matter of fact, that the company continuously, throughout the periods for which these taxes were levied, carried on business in Pennsylvania, and had about 100 cars within the state."

This case was followed in a Kansas case which seems to have involved like taxation:

"This was a bill in equity by Pullman Palace Car Company * * * to restrain the collection of a tax assessed in 1885 and 1886, by the board of railroad assessors of the State of Kansas, to the said railroad corporations, upon sleeping cars, dining-room cars, and parlor cars, owned by the plaintiff, and by it let to those corporations, and employed exclusively in interstate commerce; and apportioned among the counties aforesaid, according to the mileage of the railroads in each county; and levied accordingly in those counties."

P. P. Car Company vs. Hayward, 141 U. S., 37.

In the case of *Marye vs. B. & O. R. R.*, the tax involved was not sustained, but solely for the reason that the State of Virginia had not provided by statute for taxation on property of foreign railroad corporations within its jurisdiction, but it was held that the State had the power and authority so to do. This Court said:

"It is not denied, as it cannot be, that the State of Virginia has rightful power to levy and collect a tax upon such property used and

found within its territorial limits, as this property was used and found, if and whenever it may choose, by apt legislation, to exert its authority over the subject. It is quite true, as the *situs* of the Baltimore & Ohio Railroad Company is in the State of Maryland, that also, upon general principles, is the *situs* of all its personal property; but for purposes of taxation, as well as for other purposes, that *situs* may be fixed in whatever locality the property may be brought and used by its owner by the law of the place where it is found. If the Baltimore & Ohio Railroad Company is permitted by the State of Virginia to bring into its territory, and there habitually to use and employ, a portion of its movable personal property, and the railroad company chooses so to do, it would certainly be competent and legitimate for the state to impose upon such property, thus used and employed, its fair share of the burdens of taxation imposed upon similar property used in the like way by its own citizens. And such a tax might properly be assessed and collected in cases like the present, where the specific and individual items of property so used and employed were not continuously the same, but were constantly changing, according to the exigencies of the business. In such cases, the tax might be fixed by an appraisement and valuation of the average amount of the property thus habitually used, and collected by distraint upon any portion that might at any time be found. Of course, the lawlessness of a tax upon vehicles of transportation used by common carriers might have to be considered in particular instances, with reference to its operation as a regulation of commerce among the states, but the mere fact that they were employed as vehicles of transportation in the interchange of interstate commerce would not render their taxation invalid."

Marye vs. B. & O. R. R., 127 U. S., 123
and 124.

Counsel for plaintiff in error quote a number of authorities to the effect that vehicles and other property used in interstate commerce acquire no *situs* for taxation in other states than those of their domicile; but, I think an examination of all those cases will show that they arise over attempts to tax or license the privilege of doing business with such property in another state, and do not go to the extent of the right of the state to tax the property itself, as property, in the same manner, and to the same extent, as other property in such state; but, should any of them in any wise seem to hold a contrary doctrine than announced in 127, 141, 155, 165, and 166, United States reports, they are, of course, overthrown by these later and exhaustive decisions.

Two of the principal cases now cited by the learned counsel were also cited by them in the Supreme Court of the State of Colorado, and that court directly referred and distinguished such cases from this at bar, in the following language:

"Pickard vs. Pullman Southern Car Company, 117 U. S., 34, and Pullman Southern Car Company vs. Nolan, 22 Fed. Reporter, 276, are mainly relied on as sustaining a contrary view. While the Court uses general expressions touching the question of situs that seem to sustain the contention of defendant in error, it is to be observed that the question then under consideration was the validity of a license, or privilege tax imposed upon cars employed in interstate commerce, and the language touching the situs of the property was used with reference to the right of a state to impose such

a tax, and not as to its jurisdiction to impose a property tax, as in the case under consideration."

"In *Pullman's Palace Car Company vs. Pa.*, *supra*, Mr. Justice Gray, referring to these and kindred cases, says:

"Much reliance is also placed by plaintiff in error upon the cases in which this Court has decided that citizens or corporations of one state cannot be taxed by another state for a license or privilege to carry on interstate or foreign commerce within its limits; but in each of those cases the tax was not upon the property employed in that business, but upon the right to carry on the business at all, and was, thereby held to impose a direct burden upon the commerce itself."

"It will be readily seen, therefore, that the expressions of the Court in regard to the question of *situs* could have no significance or bearing upon that question as presented in this case. If it can be said that the Court, in those cases, intended to hold that under the conditions therein disclosed the cars acquired no *situs* that would subject them to a property tax, then its finding was in direct conflict with the conclusion reached in the later cases above referred to."

So it is throughout the books. A broad and clear distinction is made on the one hand, between a state enactment that in anywise attempts to regulate, or attach conditions to, the privilege of conducting commerce among and between the different states of the Federal Union, and, on the other hand, a state enactment which merely assumes to subject property within its jurisdiction—although belonging

to a company engaged in interstate commerce—to equitable taxation, *i. e.*, a rate and valuation not excessive when compared with taxation of like property wherever and by whomsoever owned. The first is unlawful and invalid; the second is lawful and valid. But without such adjudications, clear and impartial reason will furnish the like distinction. In the one case, the controlling power of Federal authority must restrain the state—an integral part of the Union—from directly or indirectly inhibiting or burdening commerce between citizens of the different states, whereby like freedom of interstate commerce cannot be exercised by all, regardless of their state domicile or citizenship. But, on the contrary, the same Federal authority will refrain from interference, nor place any obstacle, where the state seeks only to compel all wealth and property within its borders—whether permanently, or practically so, by continuous use therein—to assume its share of the burdens of government for such jurisdiction.

The line of separation, the criterion or test, as to property of persons or companies transacting an interstate business or commerce, turns usually on the matter of location of property. It is oftentimes difficult to ascertain in what jurisdiction, and to what extent, any property has this location or *situs* for taxation purposes. Especially is this so of intangible property, as in the Express Company cases. But in the case at bar, where tangible property of a definite kind, quantity, and value, is habitually within the jurisdiction of one state, and *ipso facto*, not in any other jurisdiction, to deny that particular state the right of equitable taxation, is an

invasion of its sovereignty and would be to make the right of free and unrestricted commerce between the states the cloak for unworthy purposes, and the means of evasion of just obligations to the state.

Respectfully submitted,

ALEXANDER B. McKINLEY,

Attorney for Defendant in Error.

Statement of the Case.

AMERICAN REFRIGERATOR TRANSIT COMPANY
v. HALL.

ERROR TO THE SUPREME COURT OF THE STATE OF COLORADO.

No. 226. Argued and submitted March 16, 17, 1899. — Decided April 24, 1899.

It having been settled, by previous decisions of this court, that where a corporation of one State brings into another State, to use and employ, a portion of its movable property, it is legitimate for the latter State to impose upon such property thus used and employed, its fair share of the burdens of taxation imposed upon similar property, used in like way by its own citizens, it is now held that such a tax may be properly assessed and collected when the specific and individual items of property so used (railway cars) were not continuously the same, but were constantly changing according to the exigencies of the business, and that the tax may be fixed by an appraisalment and valuation of the average amount of the property thus habitually used and employed; and that the fact that such cars were employed as vehicles of transportation in the interchange of interstate commerce would not render their taxation invalid.

In March, 1896, the American Refrigerator Transit Company, a corporation organized under the laws of the State of Illinois, filed, in the district court of Arapahoe County, State of Colorado, against Frank Hall, treasurer of said county, a bill of complaint seeking to restrain the defendant from enforcing payment by the said transit company of certain taxes assessed upon refrigerator cars owned by the company, and used for the transportation of perishable freight over various lines of railroad throughout the United States. The bill alleged that the business in which said cars were engaged was exclusively interstate commerce business; that the company has and has had no office or place of business within the State of Colorado, and that all the freight transported in plaintiff's cars was transported either from a point or points in a State outside of the State of Colorado to a point within that State, or from a point in the State of Colorado to a point without said State, or between points wholly outside of said State; that said cars had no taxable situs within said State; that said assessment of taxes upon said cars was without authority of

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law and void; and that complainant had no plain or adequate remedy at law.

A demurrer to the complaint was overruled and answer was filed denying some and admitting other allegations of the bill. At the trial the parties agreed to and filed the following stipulation:

"1st. That plaintiff is and was during the times mentioned in the petition a corporation duly organized and existing by virtue of the laws of the State of Illinois, with its principal office in the city of East St. Louis, in said State; that it is engaged in the business of furnishing refrigerator cars for the transportation of perishable products over the various lines of railroads in the United States; that these cars are more expensive than the ordinary box or freight car; that the cars referred to are the sole and exclusive property of the plaintiff, and that the plaintiff furnishes the same to be run indiscriminately over any lines of railroad over which shippers on said railroads may desire to route them in shipping, and furnishes the same for transportation of perishable freight upon the direct request of shippers or of railroad companies requesting the same on behalf of shippers, but on the responsibility of the carrier and not of the shipper; that as compensation for the use of its cars plaintiff received a mileage of three fourths of a cent per mile run from each railroad company over whose lines said cars are run, such rate of payment being the same as is paid by all railroad companies to each other for the use of the ordinary freight cars of each when used on the lines of others in the exchange of cars incident to through transportation of freight over connecting lines of railroads; that plaintiff has not and never has had any contract of any kind whatsoever by which its cars are leased or allotted to or by which it agrees to furnish its cars to any railroad company operating within the State of Colorado; that it has and has had during said times no office or place of business nor other property than its cars within the State of Colorado, and that all the freight transported in plaintiff's cars in or through the State of Colorado, including the cars assessed, was transported in such cars either from a point or points in a State of the United

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States outside of the State of Colorado to a point in the State of Colorado, or from a point in the State of Colorado to a point outside of said State, or between points wholly outside of said State of Colorado, and said cars never were run in said State in fixed numbers nor at regular times, nor as a regular part of particular trains, nor were any certain cars ever in the State of Colorado, except as engaged in such business aforesaid, and then only transiently present in said State for such purposes.

"That, owing to the varying and irregular demand for such cars, the various railroad companies within the State of Colorado have not deemed it a profitable investment to build or own cars of such character, and therefore relied upon securing such cars when needed from the plaintiff or corporations doing a like business.

"That it is necessary for the railroad companies operating within the State of Colorado, and which are required to carry over their lines perishable freight, such as fruits, meats and the like, to have such character of cars wherein they can safely transport such character of freight.

"2d. That the average number of cars of the plaintiff used in the course of the business aforesaid within the State of Colorado during the year for which such assessment was made would equal forty, and that the cash value of plaintiff's cars exceeds the sum of \$250 per car, and that if such property of the plaintiff is assessable and taxable within such State of Colorado, then the amount for which such cars, the property of the plaintiff, is assessed by said state board of equalization is just and reasonable, and not in excess of the value placed upon other like property within said State for the purposes of taxation.

"3d. That said company is not doing business in this State, except as shown in this stipulation and by the facts admitted in the pleadings.

"4th. That in case it be found by the court under the undisputed facts set forth in the pleadings and the facts herein stipulated that the authorities of the State of Colorado under existing laws have no power to assess or tax the said property of plaintiff, then judgment shall be entered herein for the

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plaintiff for the relief prayed; otherwise judgment shall be entered for the defendants.

"The following constitutional and statutory provisions are referred to in the opinion:

'All corporations in this state, or doing business therein, shall be subject to taxation for state, county, school, municipal and other purposes, on the real and personal property owned or used by them within the territorial limits of the authority levying the tax.' (§ 10, art. 10, state const.)

'SEC. 3765. (M. A. S.) All property, both real and personal, within the State, not expressly exempt by law, shall be subject to taxation. . . .'

'SEC. 3804. . . . It shall be the duty of said board (the board of equalization) to assess all the property in this State owned, used or controlled by railway companies, telegraph, telephone and sleeping or palace car companies.

'SEC. 3805. The president, vice president, general superintendent, auditor, tax agent or some other officer of such railway, sleeping, general or other palace car, or telegraph or telephone company, or corporation, owning, operating, controlling or having in its possession in this State any property, shall furnish said board on or before the fifteenth day of March, in each year, a statement signed and sworn to by one of such officers, and showing in detail for the year ending on the thirty-first day of December preceding.'

"5th. A full list of rolling stock belonging to or operated by such railway company, setting forth the number, class and value of all locomotives, passenger cars, sleeping cars or other palace cars, express cars, baggage cars, mail cars, box cars, cattle cars, coal cars, platform cars and all other kinds of cars owned or used by said company. The statement shall show the actual proportion of the rolling stock in use on the company's road, all of which is necessary for the transportation of freight and passengers, and the operation of the road within the State during the year for which the statement is made. The said statement shall also show the actual proportion of rolling stock of said company used upon leased lines and lines operated with others within the

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State, the mileage so leased and operated and the location thereof. . . .

"7th. . . . Whenever it shall be found that one corporation uses or controls any property belonging to or owned by another corporation, said board may assess such property either to the corporation using or controlling the same, or to the corporation by which it is owned or to which it belongs. But every such corporation shall, in the statement to said board, set forth what property belonging to or owned by any other corporation is used or controlled by the corporation making the statement."

The cause having come on to be heard, judgment was entered on behalf of the plaintiff, awarding a perpetual injunction as prayed for in the bill of complaint. Thereupon an appeal was taken to the Supreme Court of the State, from whose decision, reversing the judgment of the trial court and directing the dismissal of the bill, an appeal was taken to this court.

Mr. Judson Harman for plaintiff in error. *Mr. Percy Werner* was on his brief.

Mr. Alexander B. McKinley for defendant in error, submitted on his brief.

MR. JUSTICE SHIRAS, after stating the case, delivered the opinion of the court.

In this record we again meet the problem, so often presented, how to reconcile the rightful power of a State to tax property within its borders with its duty to obey those provisions of the Federal Constitution which forbid the taking of property without due process of law, and the imposition of burdens upon interstate commerce.

The frequency with which the question has arisen is evidence both of its importance and of its difficulty. The vast increase of commerce throughout the country, and the consequent necessary increase of the means whereby such commerce is carried on, have been the occasion of many of the cases in which this court has been called upon to consider the

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subject. The expense involved in the manufacture of some of the common articles in daily use and in their transportation is so great as to be beyond the means of individuals, and has rendered necessary the aggregation of capital in the form of corporations. Usually such corporations, though organized under the law of one State, make their profits by doing their business in several or all of the States, and, while so doing, receive the protection of their laws. When the taxpayers of one State perceive that they are subjected to competition by the importation of articles made in another, or that they are contributing continually to the prosperity of foreign corporations, what more natural than that they should demand that some share of the public burdens should be put upon such corporations? The difficult task of the lawmaker is to meet that natural and proper demand without infringing upon the freedom of interstate commerce, or depriving those engaged therein of the equal protection of the laws.

In the case before us we do not need to go far in search of the principles which determine it. We think they may be found in the cases of *Western Union Tel. Co. v. Massachusetts*, 125 U. S. 530; *Pullman's Palace Car Co. v. Pennsylvania*, 141 U. S. 18; and *Adams Express Co. v. Ohio*, 165 U. S. 194.

In the first of those cases was involved the question of the validity of a law of Massachusetts, which imposed on the Western Union Telegraph Company, a corporation of the State of New York, a tax on account of the property owned and used by it within the State of Massachusetts, the value of which was to be ascertained by comparing the length of its lines in that State with the length of its entire lines. This court held that such a tax is essentially an excise tax, and not forbidden by the commerce clause of the Constitution.

In *Pullman's Palace Car Co. v. Pennsylvania* the nature of the case and the conclusion were thus stated by Mr. Justice Gray:

"The cars of this company within the State of Pennsylvania are employed in interstate commerce; but their being so employed does not exempt them from taxation by the State; and the State has not taxed them because of their being so

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employed, but because of their being within its territory and jurisdiction. The cars were continuously and permanently employed in going to and fro upon certain routes of travel. If they had never passed beyond the limits of Pennsylvania it could not be doubted that the State could tax them, like other property within its borders, notwithstanding they were employed in interstate commerce. The fact that, instead of stopping at the state boundary, they cross that boundary in going out and coming back, cannot affect the power of the State to levy a tax upon them. The State, having the right, for the purposes of taxation, to tax any personal property found within its jurisdiction, without regard to the place of the owner's domicile, could tax the specific cars which at a given moment were within its borders. The route over which the cars travel extending beyond the limits of the State, particular cars may not remain within the State; but the company has at all times substantially the same number of cars within the State, and continuously and constantly uses there a portion of its property; and it is distinctly found, as matter of fact, that the company continuously, throughout the periods for which these taxes were levied, carried on business in Pennsylvania, and had about one hundred cars within the State.

"The mode which the State of Pennsylvania adopted to ascertain the proportion of the company's property upon which it should be taxed in that State, was by taking as a basis of assessment such proportion of the capital stock of the company as the number of miles over which it ran its cars within the State bore to the whole number of miles, in that and other States, over which its cars were run. This was a just and equitable method of assessment; and if it were adopted by all the States through which these cars ran, the company would be assessed upon the whole of its capital stock and no more."

Adams Express Co. v. Ohio was a case wherein was drawn in question the validity of a law of the State of Ohio imposing an assessment upon an express company whose business was carried on through several States. The statute required a board of assessors "to proceed to ascertain and assess the value

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of the property of express, telegraph and telephone companies in Ohio, and in determining the value of the property of said companies in this State, to be taxed within the State and assessed as herein provided, said board shall be guided by the value of said property as determined by the value of the entire capital stock of said companies, and such other evidence and rules as will enable said board to arrive at the true value in money of the entire property of said companies within the State of Ohio, in the proportion which the same bears to the entire property of said companies, as determined by the value of the capital stock thereof, and the other evidence and rules as aforesaid."

It was contended, on behalf of the express company, that the law in question was invalid because it sought to impose taxes on property beyond the territorial jurisdiction of Ohio; because the assessments therein provided for were an invasion of the constitutional guaranty of the equal protection of the laws, and because the assessments imposed a burden upon interstate commerce. But this court held otherwise. Portions of the opinion of Mr. Chief Justice Fuller may be appropriately quoted:

"Although the transportation of the subjects of interstate commerce, or the receipts received therefrom, or the occupation or business of carrying it on, cannot be directly subjected to state taxation, yet property belonging to corporations or companies engaged in such commerce may be; and whatever the particular form of the exaction, if it is essentially only property taxation, it will not be considered as falling within the inhibition of the Constitution. Corporations and companies engaged in interstate commerce should bear their proper proportion of the burdens of the governments under whose protection they conduct their operations, and taxation on property, collectible by the ordinary means, does not affect interstate commerce otherwise than incidentally, as all business is affected by the necessity of contributing to the support of government.

"As to railroad, telegraph and sleeping car companies, engaged in interstate commerce, it has often been held by this court that their property, in the several States through which

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their lines or business extended, might be valued as a unit for the purposes of taxation, taking into consideration the uses to which it was put and all the elements making up aggregate value, and that a proportion of the whole fairly and properly ascertained might be taxed by the particular State without violating any Federal restriction.

"The valuation was thus not confined to the wires, poles and instruments of the telegraph company; or the roadbed, ties, rails and spikes of the railroad company; or the cars of the sleeping car company; but included the proportionate part of the value resulting from the combination of the means by which the business was carried on — a value existing to an appreciable extent throughout the entire domain of operation. And it has been decided that a proper mode of ascertaining the assessable value of so much of the whole property as is situated in a particular State is, in the case of railroads, to take that part of the value of the entire road which is measured by the proportion of its length therein to the length of the whole, *Pittsburgh Railway v. Backus*, 154 U. S. 421, or taking as the basis of assessment such proportion of the capital stock of a sleeping car company as the number of miles of railroad over which its cars are run in a particular State bears to the whole number of miles traversed by them in that and other States, *Pullman's Palace Car Co. v. Pennsylvania*, 141 U. S. 18, or such a proportion of the whole value of the capital stock of a telegraph company as the length of its lines within a State bears to the length of its lines everywhere, deducting a sum equal to the value of its real estate and machinery subject to local taxation within the State. *Western Union Tel. Co. v. Taggart*, 163 U. S. 1.

"Doubtless there is a distinction between the property of railroad and telegraph companies and that of express companies. The physical unity existing in the former is lacking in the latter; but there is the same unity in the use of the entire property for the specific purpose, and there are the same elements of value arising from such use. The cars of the Pullman Company did not constitute a physical unity, and their value as separate cars did not bear a direct relation to

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the valuation which was sustained in that case. The cars were moved by railway carriers under contract, and the taxation of the corporation in Pennsylvania was sustained on the theory that the whole property of the company might be regarded as a unit plant, with a unit value, a proportionate part of which value might be reached by the state authorities on the basis indicted."

On a petition for a rehearing, the questions were again fully argued, and the conclusions reached on the first hearing were reaffirmed. *Adams Express Co. v. Ohio*, 166 U. S. 185. From the opinion denying the rehearing, delivered by Mr. Justice Brewer, a few extracts may be quoted as applicable to the case in hand:

"Where is the situs of this intangible property? The Adams Express Company has, according to its showing, in round numbers \$4,000,000 of tangible property scattered through different States, and with that tangible property thus scattered transacts its business. By the business which it transacts, by combining into a single use all these separate pieces and articles of tangible property, by the contracts, franchises and privileges which it has acquired and possesses, it has created a corporate property of the actual value of \$16,000,000. Thus, according to its figures, this intangible property, its franchises, privileges, etc., is of the value of \$12,000,000, and its tangible property of only \$4,000,000. Where is the situs of this intangible property? Is it simply where its home office is, where is found the central directing thought which controls the workings of the great machine, or in the State which gave it its corporate franchise, or is that intangible property distributed wherever its tangible property is located and its work done? Clearly, as we think, the latter. Every State within which it is transacting business and where it has its property, more or less, may rightfully say that the \$16,000,000 of value which it possesses springs not merely from the original grant of corporate power by the State which incorporated it or from the mere ownership of the tangible property, but it springs from the fact that that tangible property it has combined with contracts, franchises

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and privileges into a single unit of property, and this State contributes to that aggregate value not merely the separate value of such tangible property as is within its limits, but its proportionate share of the value of the entire property. That this is true is obvious from the result that would follow if all the States other than the one which created the corporation could and should withhold from it the right to transact express business within their limits. It might continue to own all its tangible property within each of those States, but, unable to transact the express business within their limits, that \$12,000,000 of value attributable to its intangible property would shrivel to a mere trifle. . . . In conclusion, let us say that this is eminently a practical age; that courts must recognize things as they are and as possessing a value which is accorded to them in the markets of the world, and that no fine spun theories about situs should interfere to enable these large corporations, whose business is carried on through many States, to escape from bearing in each State such burden of taxation as a fair distribution of the actual value of their property among those States requires."

The constitution of the State of Colorado provides that all corporations in the State or doing business therein shall be subject to taxation on the real and personal property owned or used by them within the territorial limits of the authority levying the tax, and its statutes provide for a board of equalization, whose duty it shall be to assess all the property in the State owned, used or controlled by railway companies, telegraph, telephone and sleeping or palace car companies; and that whenever it shall be found that one corporation uses or controls any property belonging to or owned by another corporation, said board may assess such property either to the corporation using or controlling the same, or to the corporation to which it belongs.

The American Refrigerator Transit Company is a corporation of the State of Illinois, engaged in the business of furnishing refrigerator cars for the transportation of perishable products over the various lines of railroads in the United States, and receives as compensation for the use of its cars a

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mileage of three fourths of a cent per mile from each railroad company over whose lines said cars are run.

The receiver of the Union Pacific, Denver and Gulf Company reported to the board of equalization that he had on the line of the railroad which he was operating within the State of Colorado forty-two refrigerator cars belonging to the American Refrigerator Transit Company on December 31, 1894. The board thereupon assessed to the Transit Company said forty-two cars, at a valuation of two hundred and fifty dollars each, and distributed said assessment to the different counties through which the line of said railroad extended.

It was stipulated in the trial court "that it is necessary for the railroad companies operating within the State of Colorado, and which are required to carry over their lines perishable freight, to have such character of cars wherein they can safely transport such freight; and that owing to the varying and irregular demands for such cars, the various railroad companies within the State of Colorado have not deemed it profitable to build or own cars of such character, and therefore rely upon securing such cars when needed from the Transit Company, or corporations doing a like business."

It was further stipulated "that the average number of cars of the plaintiff used in the course of the business aforesaid within the State of Colorado during the year for which such assessment was made would equal forty, and that the cash value of plaintiff's cars exceeds the sum of two hundred and fifty dollars per car, and that if such property of the plaintiff is assessable and taxable within such State, then the amount for which such cars, the property of the plaintiff, is assessed by said state board of equalization is just and reasonable, and not in excess of the value placed upon other like property within said State for the purposes of taxation."

Applying the reasoning and conclusions of the cases hereinbefore cited to those admitted facts, we have no difficulty in affirming the judgment of the Supreme Court of Colorado sustaining the validity of the taxation in question.

The state statutes impose no burdens on the business of the plaintiff in error, but contemplate only the assessment and

Syllabus.

levy of taxes upon the property situated within the State; and the only question is whether it was competent to ascertain the number of the cars to be subjected to taxation by inquiring into the average number used within the state limits during the period for which the assessment was made.

It having been settled, as we have seen, that where a corporation of one State brings into another, to use and employ, a portion of its movable personal property, it is legitimate for the latter to impose upon such property, thus used and employed, its fair share of the burdens of taxation imposed upon similar property used in like way by its own citizens, we think that such a tax may be properly assessed and collected, in cases like the present, where the specific and individual items of property so used and employed were not continuously the same, but were constantly changing, according to the exigencies of the business, and that the tax may be fixed by an appraisal and valuation of the average amount of the property thus habitually used and employed. Nor would the fact that such cars were employed as vehicles of transportation in the interchange of interstate commerce render their taxation valid. *Marye v. Baltimore & Ohio Railroad*, 127 U. S. 117; *Pullman's Palace Car Co. v. Pennsylvania*, 141 U. S. 18.

The judgment of the Supreme Court of the State of Colorado is accordingly

Affirmed.

MR. JUSTICE HARLAN and MR. JUSTICE WHITE dissented.

